166-673

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~878~~. ~~606~~ 209

THE MAYOR AND CITY COUNCIL OF BALTIMORE, APPELLANTS,

vs.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED DECEMBER 31, 1894.

(15,762.)

(15,762.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 878.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, APPELLANTS,

vs.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint and order of court thereon	2	1
Plaintiff's Exhibit No. 1—Mortgage from Lake Roland Elevated R'y Co. to the Baltimore Trust and Guarantee Co., trustee, September 1, 1892	23	14
No. 2—Ordinance No. 1, approved November 18, 1892, referred to as the repealing ordinance	52	30
No. 3—Copy of bill of complaint filed in case Lake Roland Elevated R'y Co. *vs.* Mayor and City Council of Baltimore and another, in circuit court of Baltimore city, and order thereon	56	32
Subpœna	74	41
Marshal's return	75	41
Affidavits filed by plaintiff	76	41
Affidavit of Joseph P. Smith	76	41
Edward C. Eichelberger (with signatures)	78	42
Walter C. Simmons	81	44

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 7, 1895.

	Original.	Print.
Affidavits of P. Hanson Hiss and Susan Hiss, his wife	83	46
Affidavit of John Curlett, president of the Central Savings Bank of Baltimore	85	47
Affidavit of Alexander Yearley, Jr	87	48
Defendant's demurrer	89	49
Defendant's answer	90	50
Defendant's Exhibit No. 1—Ordinance No. 23, approved April 8, 1891	104	58
No. 2—Record in case Lake Roland Elevated R'y Co. *vs.* Mayor and City Council of Baltimore, in court of appeals of Maryland	115	65
Transcript from circuit court of Baltimore	116	65
Bill of complaint	116	65
Order of court on foregoing bill	125	75
Plaintiff's Exhibit No. 1—Certificate of incorporation of the North Avenue R'y Co. of Baltimore	126	75
Plaintiff's Exhibit No. 2—Agreement of consolidation between the North Avenue R'y Co. and the Baltimore, Hampden and Lake Roland R. R. Co., April 20, 1892	127	76
Plaintiff's Exhibit No. 3—Ordinance No. 23, approved April 8, 1891, &c	134	83
Plaintiff's Exhibit No. 4—Ordinance No. 47, approved April 8, 1892, &c	134	83
Plaintiff's Exhibit No. 5—Agreement between the Baltimore Union Passenger R'y Co. and the North Avenue R'y Co., April 8, 1892	135	84
Plaintiff's Exhibit No. 6—Ordinance No. 46, approved April 8, 1892, &c	142	91
Plaintiff's Exhibit No. 7—Plat (not set out here)	142	91
Plaintiff's Exhibit No. 8—Plan and endorsement	142	92
Plaintiff's Exhibit No. 9—Letter (not set out here)	142	92
Plaintiff's Exhibit No. 10—Letter (not set out here)	142	92
Plaintiff's Exhibit No. 11—Ordinance, &c	143	92
Plaintiff's Exhibit No. 12—Letter from city commissioner to McLane, November 21, 1892	143	93
Plaintiff's Exhibit No. 12*a*—Ordinance, &c	143	93
Plaintiff's Exhibit No. 13—Ordinance, &c	143	93
Plaintiff's Exhibit No. 14—Plat (not set out here)	144	93
Plaintiff's Exhibit No. 15—Plat (not set out here)	144	94
Answer of defendants	144	94
Defendant's Exhibit No. 1—Journal, second branch, November 14, 1892	149	99
Defendant's Exhibit No. 2—Journal, first branch, November 14, 1892	150	100
Defendant's Exhibit No. 3—Plat (not set out here)	151	101
Petition and order to take testimony	151	102
Testimony of Joseph P. Smith	152	103
Joseph T. Brittain	166	116
L. M. Frederick	167	117
James L. McLane	180	130
L. N. Frederick (recalled)	191	141
J. K. Diffenderffer	192	142

	Original.	Print.
Testimony of R. Keith Compton	197	147
P. Hanson Hiss	200	149
James H. Smith	202	151
William P. Twomley	206	156
James L. McLane (recalled)	211	161
Ferdinand C. Latrobe	214	164
Plaintiff's Exhibit Oster Permit, November 7, 1892	222	171
Defendant's Exhibit R. K. C. No. 1—Plat (not set out here).	222	171
Defendant's Exhibit R. K. C. No. 2—Extract from the "Sun," Friday, November 4, 1892	222	171
Defendant's Exhibit R. K. C. No. 3—Extract from the "Sun," Tuesday, November 8, 1892	223	172
Defendant's Exhibit R. K. C. No. 4—Extract from the "Sun," Saturday, November 5, 1892	224	173
Defendant's Exhibit R. K. C. No. 5—Memoranda	224	174
Agreement for submission, &c	225	174
Decree *pro forma*	226	175
Order for appeal	226	176
Clerk's certificate	226	176
Decree of affirmance	227	176
Clerk's certificate	227	176
Plats referred to in Exhibit No. 2	228	177
Plaintiff's Exhibit No. 7—Map	229	177
No. 8—Map	230	177
No. 14—Map	231	177
No. 15—Map	232	177
Defendant's Exhibit No. 3—Map	233	177
Defendant's Exhibit No. 3—Opinion of Judge Bryan	234	177
No. 4—Separate opinion of Chief Judge Alvey on motion for re-argument	259	189
No. 5—Answer of mayor and city council of Baltimore and A. E. Smyrk, city commissioner, in case in circuit court, Baltimore City against Lake Roland Elevated Railway Co	265	192
No. 5½—Order for injunction in case of Lake Roland Elevated Railway Co. *vs.* Mayor and City Council of Baltimore and A. E. Smyrk, city commissioner	274	196
No. 6—Affidavit of Ferdinand C. Latrobe, mayor of Baltimore	276	197
No. 7—Affidavit of William S. Bryan, Jr., city solicitor of Baltimore	277	198
J. L. McL.—Letter from Wm. S. Bryan, Jr., to James L. McLane, March 21, 1893	283	202
Affidavits filed by defendant	284	202
Affidavit of Wm. P. Twamley	284	202
A. E. Smyrk, city commissioner	285	203
R. Keith Compton	287	204
Additional affidavits filed by plaintiff	288	204

	Original.	Print.
Affidavit of James L. McLane	289	204
L. N. Frederick	290	205
Randolph Barton	292	206
Richard J. Capron	294	207
Additional affidavit of E. C. Eichelberger	296	209
Affidavit of W. H. Buckler (with newspaper cuttings)	298	210
Affidavit of E. H. Bouton	302	215
Defendant's motion not to receive certain affidavits	306	218
Defendant's exception to affidavits filed by plaintiff	307	219
Petition of defendant for leave to file certain exhibits	308	219
Defendant's Exhibit A—Editorial, Baltimore "Sun"	309	220
B—Certificate of persons opposed to two railway tracks on Lexington street	310	221
Affidavit of Joseph W. Whiteford	312	222
Agreement as to hearing	313	223
Opinion of Circuit Judge Goff	315	224
Dissenting opinion of District Judge Morris	331	232
Final decree	340	236
Petition for allowance of appeal, assignment of errors, and order of court allowing the appeal and fixing amount of supersedeas bond	343	237
Appeal bond	355	243
Citation	357	243
Order to transmit the record	358	244
Clerk's certificate	358	244

1 UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

At a circuit court of the United States for the fourth circuit in and for the district of Maryland, begun and held at the court-house, in the city of Baltimore, on the first Monday of November, being the fifth day of the same month, in the year of our Lord one thousand eight hundred and ninety-four—present, the Honorable Nathan Goff, circuit judge; Thomas J. Morris, judge of the Maryland district; William L. Marbury, Esquire, attorney; Charles H. Evans, Esquire, marshal; James W. Chew, clerk—among other were the following proceedings, to wit:

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee, Plaintiff,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE, Defendant. } In Equity.

2 *Bill of Complaint & Order of Court Thereon.*

Filed April 15, 1893.

In the Circuit Court of the United States for the District of Maryland.

THE BALTIMORE TRUST & GUARANTEE COMPANY, Trustee, Plaintiff,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE, Defendant. } In Equity.

To the honorable the judge of said court, sitting as a court of equity:

The Baltimore Trust and Guarantee Company, a corporation of the State of Maryland, duly incorporated, having its principal place of business in the city of Baltimore, and trustee as hereinafter set forth, brings this its bill of complaint against the mayor and city council of Baltimore, a body corporate, of the same State, and, complaining, says:

I. That by a certain indenture, made on the first day of September, in the year 1892, the Lake Roland Elevated Railway Company, a corporation duly created and organized under the laws of the State of Maryland, for the purpose of securing the payment of the principal and interest of one thousand first-mortgage coupon bonds, of the denomination of one thousand dollars each, aggregating one million of dollars, payable in gold coin of the United States of America of the present standard of weight and fineness, numbered consecutively from one to one thousand, inclusive, bearing interest at the rate of five per cent. per annum, (the principal being due and

payable on the first day of September, in the year 1942,) granted, bargained, sold, assigned, set over, released, conveyed and confirmed unto your orator and to its successor or successors in the trust thereby created, and to its, his or their assigns, all and singular the railway and railway tracks owned, used, occupied, possessed or enjoyed by the said Lake Roland Elevated Railway Company, and including particularly the line of railway authorized to be constructed by the North Avenue Railway Company of Baltimore City by virtue of ordinance No. 23, approved April 8th, 1891, of the ordinances of the mayor and city council of Baltimore, which included the
3 right to lay double tracks on Lexington street in the city of Baltimore, from the corner of Charles and Lexington streets, (the city terminus of the railway system of the said Lake Roland Elevated Railway Company,) eastwardly along Lexington street to the corner of Lexington and North streets; and your orator files herewith a duly certified copy of the said indenture, which has been duly recorded among the land records of Baltimore city and the mortgage records of Baltimore county, and which is prayed to be taken as a part of this bill of complaint, said certified copy being marked "Plaintiff's Exhibit No. 1."

II. That the said Lake Roland Elevated Railway Company was formed and organized under the laws of the State of Maryland under an agreement of consolidation between the North Avenue Railway Company of Baltimore City and the Baltimore, Hampden and Lake Roland Railroad Company, both of said constituent corporations being also corporations of the State of Maryland, duly incorporated under the laws of said State, the said Baltimore, Hampden and Lake Roland Railroad Company having been originally incorporated by the General Assembly of Maryland by chapter 285 of the Acts of 1872, which act was revised and amended by the said General Assembly by chapter 232 of the Acts of 1892, and the said North Avenue Railway Company of Baltimore City having been duly incorporated and organized under the general corporation laws of the State of Maryland, providing for the formation of such corporation, by the filing of a certificate of incorporation with the secretary of state of the State of Maryland on the seventh day of May, in the year 1889, and that by the second article of said certificate of incorporation, it is provided as follows:

Second. We do further certify, that the said corporation so formed is a corporation for the purpose of constructing and running a passenger railway in the city of Baltimore, the whole line of said road being located in said city, and the termini of said road being therein; and that the term of existence of the said corporation is limited to forty years; and that the said corporation is formed upon the
4 articles, conditions and provisions herein expressed, and subject in all particulars to the limitations relating to corporations, which are contained in the general laws of this State.

And that by the act of 1890, chapter 217 of the General Assembly of Maryland, entitled "An act to amend the charter of the North Avenue Railway Company of Baltimore City by authorizing it to lease, purchase or aid other roads," the corporate existence of the

said North Avenue Railway Company of Baltimore City was expressly recognized, and thereby ratified by the said General Assembly of Maryland for the purposes set out in said second article of its certificate of incorporation as above quoted.

III. That, although the said North Avenue Railway Company of Baltimore City was thus lawfully authorized by the General Assembly of Maryland, to construct and run a passenger railway in the city of Baltimore, it is expressly provided by the act of 1876, chapter 242, (the general railway act, under which the said North Avenue Company was incorporated) section 13, codified in the Code of Public General Laws in article 23, section 169: "That no railroad company shall be allowed to pass through the city of Baltimore without the consent of the municipal authorities," and that the said North Avenue Company, therefore, made application to the mayor and city council of Baltimore, for the purpose of obtaining its consent to the use of certain streets of the city of Baltimore, including the right to lay and maintain double railway tracks on Lexington street, from North street to Charles street, for the purpose of reaching its proposed terminus at the corner of Charles street and Lexington street; that an ordinance was introduced on behalf of the said North Avenue Company, on November 17th, 1890, and referred to the joint standing committee on city passenger railways; that the said ordinance remained in the hands of the said joint standing committee for nearly five months, during which period of time the advantages and disadvantages which would arise to the people of the city of Baltimore from the passage of said ordinance, were elaborately discussed in the public press, and a great number of public meetings were held in the council chamber of the first branch for the purpose of hearing the friends and opponents of said ordinance; that at these public meetings large numbers of persons owning property on Lexington street, including the present mayor of the city of Baltimore, were present in advocacy of the passage of said ordinance, and although it was set out in the title, as well as the body of said ordinance in plain and unmistakable terms, that if passed it would authorize the construction of double tracks on Lexington street, between North street and Charles street, nevertheless no suggestion whatever was ever made by any property-holder, or by any newspaper, or by any public official or private citizen, that there was any objection whatever to the construction or maintenance of double railway tracks on Lexington street, it being then known, as will be hereafter more particularly shown, that Charles street, between Saratoga street and German street, is of the same width as Lexington street, and that double passenger railway tracks have been maintained on Charles streets for fifteen years without any public annoyance or inconvenience.

IV. That after this careful and elaborate discussion, on April 8, 1891, ordinance No. 23, entitled "An ordinance to authorize the construction of city passenger railway tracks by the North Avenue Railway Company of Baltimore City, on North avenue from McCulloh street to Guilford avenue, and thence on Guilford avenue and North street to Lexington street, and thence on Lexington street to Charles

street, and on North street to the north side of Fayette street," was approved.

That by the first section of this ordinance, the North Avenue Railway Company was authorized "to lay down and construct double iron railway tracks for the purposes of its business, and in connection with double tracks now authorized to be constructed by it on North avenue to McCulloh street, beginning for said extension on North avenue, and running thence on North avenue eastwardly to Guilford avenue, and running thence on Guilford avenue and North street southwardly to the intersection of North street with Lexington street, and thence on Lexington street westwardly to Charles." * * *

6 That this right to construct double tracks on Lexington street was given upon the following express conditions, to the performance of which the said North Avenue Company became bound by the acceptance of the said ordinance, which ordinance is hereby expressly referred to and made part of this bill of complaint, to which conditions the said Lake Roland Elevated Railroad Company has also become bound by virtue of the aforesaid agreement of consolidation, under which it succeeded to all the corporate rights and franchises of the said North Avenue Railway Company of Baltimore City:

(*a.*) That the North Avenue Company should permit other railway companies to use its tracks upon certain conditions. (Section 2.)

(*b.*) That it shall carry over its line, free of charge, passengers who present transfer tickets from any other city passenger railway company connecting with it. (Section 4, subsection 3.)

(*c.*) That it shall at all times keep the spaces between its tracks, and two feet on each side thereof, in good repair; and whenever any portion of any street upon which its track shall be laid under the provisions of this ordinance, shall be repaved, then the said railway company shall be required to pay the entire expense of repaving said spaces with such pavement as the mayor and city council shall prescribe.

(*d.*) That the North Avenue Company shall permit all electric light, telephone, telegraph or other wires on North street to be strung on its elevated structure "in such a manner that the company owning said poles may have the same free use of said structure for their said wires, without cost or inconvenience, as they now have of their said poles." (Section 5.)

(*e.*) That it shall be liable for the payment of the park tax, "and shall be subject to all the general regulations now existing or hereafter to be made, relating to city passenger railways not inconsistent with this ordinance." (Section 7.)

(*f.*) "That the mayor and city council of Baltimore shall have the privilege, within two years after the expiration of fifteen years from the passage of this ordinance, to purchase and buy out the stock

7 and interest of the said North Avenue Railway Company of Baltimore City, together with such appurtenances to said company, as the said mayor and city council may deem proper." (Section 11.)

That the said ordinance was duly accepted by the said North Avenue Company, and that the said North Avenue Company and the said Lake Roland Elevated Railway Company have together expended great sums of money upon the construction and equipment of the railway tracks authorized by said ordinance upon the faith of said ordinance, and especially upon the faith of the authority given in said ordinance to reach its terminus at the corner of Charles and Lexington streets with double tracks, and that the said North Avenue Company and the said Lake Roland Company have faithfully and honorably performed each and all of the conditions and duties imposed by said ordinance in consideration of the grant of the right to lay said double tracks on Lexington street, and stand ready and willing to faithfully abide by all of said terms and conditions in the future.

V. That before the said Lake Roland Company could begin the erection of its elevated railway on North street, it was necessary for it to obtain from the General Assembly of Maryland a ratification of said ordinance No. 23, so far as it related to said elevated railway, and by the act of 1892, chapter 112, the General Assembly of Maryland, after reciting that "before the said North Avenue Railway Company of Baltimore City can elevate its tracks on North street, as aforesaid, it is required by law that the sanction of the General Assembly of Maryland should be given to said ordinance, so far as it relates to said elevation of its tracks," proceeded to enact as follows:

"Be it enacted by the General Assembly of Maryland: Section 1. That ordinance No. 23, of the mayor and city council of Baltimore, approved April 8, 1891, be, and the same is hereby ratified and confirmed; this ratification to have the same effect as if the mayor and city council of Baltimore, at the time of the passage of said ordinance, had been fully authorized by the General Assembly to pass said ordinance, and to grant each and all of the powers and privi-
8 leges therein contained; the said mayor and city council to have the same power and control hereafter, in reference to the enforcement, amendment or repeal of said ordinance, as it has, or would have, in respect to any ordinance passed under its general powers."

VI. That after the passage of the aforesaid act of 1892, chapter 112, and the execution and recording of the above-mentioned agreement of consolidation, whereby the Lake Roland Elevated Railway Company succeeded to all the corporate rights and franchises of the said North Avenue Railway Company of Baltimore City, and the said Baltimore, Hampden and Lake Roland Railroad Company, the said Lake Roland Company proceeded with great diligence and at great expense, to complete the railway system which it was authorized to construct under the charter, ordinances and acts above set forth, the route of the said company being from its terminus, at the corner of Charles and Lexington streets, thence eastwardly to North street, northwardly to North avenue, and westwardly to Oak street, from which point the said company is building a double-track electric railway northwardly to Lake Roland, a distance of about eight miles,

and has its electric railway already in operation, running westwardly out North avenue to Mount Holly, a distance of about five miles; so that said railway when completed will be about fourteen miles in length, and that it is necessary for the successful operation of said railway system, that all cars traveling over it shall start from the terminus at Charles and Lexington streets, and proceed along Lexington street to North street; that a part of said railway, which had already been completed at an enormous cost, has been built as an elevated railway, as above stated, beginning at a point on North street, near Lexington street, and extending up North street to a point between Chase and Eager streets, a distance of about four thousand feet; that this elaborate and costly structure is now practically ready for the operation of the company's cars; that all the new cars, built by the Pullman Palace Car Company, are now in the city; that the great stone car barn and power-house are practically finished, and that, with the exception of the completion of the company's tracks on Lexington street, everything is being prepared for the operation of the entire system within the next month.

9 VII. That in November last, the said Lake Roland Company having laid down its double tracks on Lexington street, between North street and Charles street, as authorized by the mayor and city council as aforesaid, by the first section of ordinance No. 1, approved November 18, 1892, the mayor and city council of Baltimore provided as follows:

"SECTION 1. Be it enacted and ordained by the mayor and city council of Baltimore, that the first section of ordinance No. 23, approved April 8, 1891, so far as the same authorized and empowered the North Avenue Railway Company to lay double iron railway tracks upon the portion of East Lexington street between North street and Charles street, be and it hereby is repealed, and that the authority and license given to said North Avenue Railway Company by said first section of said ordinance to lay such double iron railway tracks, be and it hereby is revoked.

"That the said Lake Roland Company having at the time of the passage of said ordinance, under the official approval and with the sanction of the mayor and city commissioner of the city of Baltimore, already laid double tracks on Lexington street between North street and Charles street, the said repealing ordinance further prescribes that all tracks laid by the Lake Roland Company on Lexington street should be removed by the said company within ten days after they should be notified to that effect by the city commissioner, and that in case of the neglect of the company to remove such tracks, the same should be removed by the city commissioner.

That the third section of said ordinance No. 1, approved November 18, 1892, provides as follows: "Section 3. And be it further enacted and ordained, that the said North Avenue Railway Company of Baltimore City be, and it is hereby authorized and licensed to lay down, construct, maintain and use one iron railway track, and no more, on East Lexington street, between North street and Charles street, in a location to be designated by the city commissioner, upon

the same terms and subject to the same provisions and limit-
10 ations as were provided by the said ordinance No. 23, of April 8, 1891, in respect to the double iron railway tracks thereby authorized to be laid on said portion of Lexington street, and any other company shall have the same, but no greater, right to use this single track than it would have had to use the double track if this ordinance had not been passed, and the said ordinance No. 23, of April 8, 1891, had remained unaltered; provided, as a condition precedant to the right of the North Avenue Railway Company to exercise the authority or license in this section conferred upon it, the said North Avenue Railway Company shall, within twenty days from the passage of this ordinance, at its own expense, remove the whole or such portion of the double iron railway tracks that it has caused to be laid on said portion of Lexington street, as the city commissioner shall designate, and shall also, at its own expense, replace the pavement on the said portion of East Lexington street in a manner satisfactory to the city commissioner; and provided further, that any switches to connect other tracks with the aforesaid single track, which the said North Avenue Railway Company, or any other company having the right to use said tracks, may desire to lay, shall be so laid as not to extend on Lexington street more than fifty feet east of the east side of Charles street, or to be entirely east of the west side of North street, and shall be constructed and laid subject to the approval of the city commissioner;" a copy of which ordinance is filed herewith, marked "Plaintiff's Exhibit No. 2."

VIII. That the conduct and proceeding of the said Lake Roland Elevated Railroad Company and of the said mayor and city council of Baltimore, after the passage of the said repealing ordinance, is set out in detail in the bill of complaint filed in the case now pending before the circuit court of Baltimore city, in which the said Lake Roland Company is plaintiff, and the said mayor and city council of Baltimore is defendant, a copy of which bill and the order of the court thereon, is herewith filed and prayed to be taken as part of this bill of complaint, marked "Plaintiff's Exhibit No. 3," from which bill of complaint and order, this court will observe that the said circuit court of Baltimore city has granted to the said Lake Roland Company,
11 a preliminary injunction, restraining the defendant from tearing up or interfering with the track of the said Lake Roland Company, as now laid on Lexington street, or from interfering with the said Lake Roland Company in the completion of its crossings, curves, special work, etc., necessary to connect up said tracks and prepare them for the operation of the cars of the said company; that a motion is now pending before the court of appeals of Maryland for a re-argument of the case recently tried in said court, and referred to at length in the copy of said bill of complaint, and that it is the purpose of the said Lake Roland Company, if it cannot obtain a satisfactory change of said opinion delivered by the court of appeals in said case, to carry the litigation, by writ of error, to the Supreme Court of the United States for review, and that the said double track on Lexington street was not reduced to a single track with any

view of conceding the right of the mayor and city council to compel said reduction (and, even if it had been, your orator would be in no way bound thereby), but because, as shown in said copy of the said bill of complaint, said Lake Roland Company was threatened by the city authorities with a forcible interference with their rights, unless one of said tracks was removed within seven days, and that said reduction was made, pending said motion for a re-argument and an appeal to Federal authority for protection, with a view to avoiding disorder, and to allow Lexington street to be paved by the city authorities so that the public would not be inconvenienced pending the litigation by having Lexington street left in an unpaved condition; and your orator further shows that said reduction was made under the direct supervision of the city commissioner (and to his entire satisfaction), who was acting under the direct advice and instructions of the city solicitor of Baltimore, but that, after said reduction had been made, the said city solicitor changed the opinion given to the said city commissioner and advised the mayor of the city that, by reason of the failure of the Lake Roland Company to remove its double tracks within twenty days from the passage of said repealing ordinance, the said Lake Roland Company had forfeited all right to any track on Lexington street, and that even the single track, as located and laid under the authority of the city commissioner, was on Lexington street without legal
12 authority, whereupon the said mayor wrote to the president of the said Lake Roland Company the following letter:

"MAYOR'S OFFICE, BALTIMORE, *April* 1, 1893.

Mr. James L. McLane, president Lake Roland Elevated Railway Company:

DEAR SIR: I am advised by the city solicitor that the Lake Roland Elevated Railroad Company has no authority to lay its tracks on the bed of Lexington street, between North and Charles streets, in the absence of an ordinance granting such a privilege from the mayor and city council.

I, therefore, feel it my duty to advise you that, in the opinion of the city law officers, the present single track of your company is occupying the bed of this street in violation of law.

I, therefore, suggest that an application for such an ordinance be at once made to the city council. There should be no delay in this matter, as the public convenience requires that Lexington street, especially that portion of it which lies between North and Calvert streets, should be promptly made passable by repaving.

Yours very respectfully,

FERDINAND C. LATROBE, *Mayor*."

That your orator is informed that on the day following the date of said letter, the said mayor informed the said Lake Roland Company that no confirmatory ordinance would pass the council, or be approved by him, unless it contained a condition that the Lake Roland Company should remove its principal office from Roland park, where its great car barn is located, and where all its business

will be transacted, to the city of Baltimore, in order that the said Lake Roland Company might be compelled to pay taxes on stock held by non-residents to the city of Baltimore, and not to Baltimore county; also, that the said Lake Roland Company, must be
13 prepared to fight amendments changing its approach to its elevated structure from a double to a single track, and depriving it of its switch on Lexington street; and shortly afterward the said mayor announced to the public press that no confirmatory ordinance should pass unless it contained this condition in regard to the principal office of the company; and by a further inquiry, the said Lake Roland Company became convinced that even if it consented to ask for a confirmation of its right to a single track, it was not intended that such a confirmatory ordinance should pass; at least, without amendments practically destructive to the company's interests; whereupon the Lake Roland Company wrote the following letter to the mayor:

"BALTIMORE, MD., *April* 3, 1893.

Hon. Ferdinand C. Latrobe, mayor, Baltimore, Md.

DEAR SIR: I beg to acknowledge the receipt of your letter of the 1st inst., suggesting that the Lake Roland Elevated Railway Company at once make application to the city council for an ordinance authorizing its use of Lexington street between North and Charles streets, with it- present single track.

More than two weeks ago, and just after the court of appeals had given its decision in the Lexington-street case, I had, at your request, a consultation with City Counsellor Hayes and Solicitor Bryan upon the subject of the company's right to construct this single track, the result of which was that Mr. Bryan went in person to the city commissioner and instructed him to give us the necessary permit to lay the single track in the center of Lexington street. Work was at once resumed by the company, and the track practically finished some days ago, under the direction and to the entire satisfaction of the city commissioner; and but for the fact that the contractor who was engaged in putting down the asphalt pavement between Calvert and North streets has been stopped by the city itself, the whole of Lexington street would be promptly made passable.

In view of the fact, therefore, that the single track as now laid on Lexington street is entirely satisfactory to yourself and the city commissioner, and is in strict accordance with the spirit and
14 intention of the repealing ordinance of November, 1892, and the agreement of counsel, and that the supplementary ordinance is suggested by you rather as a matter of form than of substance, I feel that I am not unreasonable in asking you to withhold further objection to the track until such time, at least, as the court of appeals takes action on this company's motion for a re-argument of the case; and, if necessary, to consent that the question as to whether the company has forfeited its rights to this single track, shall be submitted to the courts for decision.

Under the circumstances, the company is not willing to make an application for the supplementary ordinance suggested by you. You

have yourself indicated that such an ordinance would not be passed promptly, and, as a matter of course, merely to confirm the company's right to its single track, but would certainly be the subject of amendment for the purpose of imposing conditions never contemplated by the original ordinance. This condition of things I have no right to invite in a case in which I am advised and believe that this company has a clear right to maintain its single track as now constructed, and that nothing in the recent opinion of the court of appeals justifies the construction sought to be put upon the repealing ordinance of November, 1892, by City Solicitor Bryan.

Very respectfully yours, J. L. McLANE, *President.*"

To which letter the said mayor replied as follows:

"MAYOR'S OFFICE, BALTIMORE, *April* 5, 1893.

James L. McLane, Esq., president Lake Roland Elevated Railroad Company.

MY DEAR SIR: I have your letter of April 3d. Either the Lake Roland Railroad Company has or has not the legal right to retain its tracks on Lexington street, between North and Charles streets. It is the opinion of the city law officers, that in the absence of an ordinance granting it, the railroad has not this right.

By this opinion I must be governed.

The public convenience requires that this street, especially that portion of it between North and Calvert, should be promptly repaved. I must, therefore, notify you that on Wednesday, April 12, the city commissioner will commence taking up the tracks on Lexington street, between North and Calvert, preparatory to having the street repaved. This gives the railroad company an opportunity to apply to the city council, which meets on Monday, April 10, for an ordinance giving it a right to keep its tracks on this street, which, in the judgment of the city law officers, it does not possess.

Yours very respectfully,

FERDINAND C. LATROBE, *Mayor.*"

Wherefore it will be plain to this honorable court that the said Lake Roland Company is threatened with the immediate and total destruction of all its rights to lay and maintain any tracks whatever on Lexington street, which are absolutely necessary in order that it may reach its terminus at the corner of Charles and Lexington streets, and that on the eve of the completion and operation of its entire railway system, the said Lake Roland Company is about to have done to it an irreparable injury, and that the damages which will arise to the said Lake Roland Company and to your orator by reason of the removal of said track, will far exceed the sum of ten thousand dollars.

IX. That your orator is advised that ordinance No. 23, approved April 8th, 1891, by which the North Avenue Company was authorized to lay and maintain double tracks on Lexington street, having been accepted and acted upon, constituted a perpetual and inviola-

ble contract between the municipal corporation and the North
16 Avenue Company, the terms of which cannot be altered or impaired without the consent of both parties to the contract; and that, therefore, the subsequent ordinance purporting to change the terms of the original ordinance so as to deprive the North Avenue Company of the right to approach its terminus with double tracks is in contravention of the tenth section of the first article of the Constitution of the United States, which forbids legislation which impairs the obligation of contracts, and for that reason the subsequent ordinance is void.

X. That your orator is advised and charges that the right of the said Lake Roland Elevated Railroad Company to construct and maintain double railway tracks on Lexington street, between North street and Charles street, so that it may approach its terminus with double tracks, is absolutely essential to the successful and proper operation of the said railway, and without it it will be impossible for the said Lake Roland Company to maintain a sufficient schedule of cars for the carriage of its passengers and the convenient and successful performance of its duties as a common carrier of passengers for hire, and that by the repeal of said rights it would be deprived of a substantial and highly valuable part of its franchise, which would seriously diminish and impair the value of its property, and in that way deprive your orator, and the holders of the mortgage bonds issued under its mortgage as aforesaid, of a substantive, essential and valuable part of their security, and seriously lessen the value of said bonds and the opportunity of the said Lake Roland Company to promptly meet the principal and interest of the said bonds as they fall due; or in the event of a sale under said mortgage would seriously lessen the value of said property and franchises in the eyes of a purchaser; and your orator further shows that all of the one thousand bonds as aforesaid, aggregating the sum of one million dollars, have received the certificate from your orator required by said indenture, and have been in good faith issued by the said Lake Roland Company to *bona fide* purchasers for value, prior to the passage of said ordinance of November, 1892, in whose hands said bonds now remain, and that this bill is filed in the interest, for the protection and at the request of all of said bondholders (all of whom reside out of the State of Maryland),
17 for the purpose of protecting them from an irreparable injury, which as above shown, is about to be done to the said Lake Roland Company, to whose property and franchises the said bondholders and your orator can alone look for the payment of the principal and interest of the said bonds.

XI. That your orator is advised and charges that the said repealing ordinance was a wanton, arbitrary and illegal attempt to oppress the said Lake Roland Company, and is for that reason also void, and that the fact that said ordinance is designed to needlessly oppress and harm the said railway company will appear to this honorable court from the allegations of this bill and the correspondence contained therein, but that, as an illustration of the fact that no public interest demands any such harsh and oppressive treatment of said

company, this honorable court is advised that Charles street, between Saratoga street and German street, presents precisely similar public questions to those which will be presented in regard to Lexington street in the use of its double street railway tracks, Charles street between these points having been for fifteen years occupied with a set of double passenger railway tracks, and that it is a matter of common observation, that none of the disadvantages and inconveniences which have been alleged by the defendant, as likely to result from the use of two tracks on Lexington street, have resulted, in fact, from the use of two tracks on Charles street, and that your orator is prepared to prove the following statements in this regard:

(*a.*) That Charles street is of the same width as Lexington street.

(*b.*) That Charles street has more traffic upon it than Lexington street, both of heavy and light vehicles.

(*c.*) That the double tracks of the North Baltimore Passenger Railway Company have been on Charles street for nearly fifteen years, without any public inconvenience or annoyance.

(*d.*) That it has been proved that Charles street was more obstructed by a single track than by the present double tracks.

(*e.*) That the distances between the curb lines of Charles street and the outside rails of the North Baltimore Passenger Rail-
18 way Company, are the same as will be the distances between the curb lines of Lexington street and the outside rails of the Lake Roland tracks.

Wherefore, your orator claims that it is quite impossible for the defendant to pretend successfully that the said Lake Roland Company is about to make any use of Lexington street of an unusual or harmful character, and that, in view of the fact that street railway tracks are regarded in the law as facilitating the use of the streets by the public; that it is the custom for almost all vehicles to use the tram of the track in driving on the street, for which purpose they are made to fit its gauge; and that, finally, the cars of the street railways have no prior right of way—your orator claims that there does not exist any public interest as there has been no public demand, which justifies this attack made upon the rights of the said Lake Roland Company.

19 Wherefore your orator prays—

(1.) That the defendant its officers, agents and attorneys, and employees, may by injunction be restrained from tearing up or interfering with the single track and switch of the said Lake Roland Company as now laid on Lexington street or from interfering with the said Lake Roland Company in the completion of its crossings, curves, special work, etc., necessary to connect up said track and prepare it for the operation of the cars of the said company.

(2.) That the said defendant, its officers, agents, and employees, may by injunction be restrained from interfering with the said Lake Roland Company in the construction and maintenance of two tracks on Lexington street between Charles street and North street and the operation of the cars of the said Lake Roland Company thereupon.

(3.) That a decree may be passed by this court declaring that the

said ordinance No. 1, approved November 18, 1892, of the ordinances of the mayor and city council of Baltimore is in violation of the tenth section of the first article of the Constitution of the United States of America, and is therefore void.

(4.) That your orator may have such other and further relief as its case may require.

May it please your honor to grant unto your orator the writ
20 of injunction as above prayed, and also a writ of summons directed to the said mayor and city council of Baltimore, commanding it to be and appear in this court on some certain day to be named therein to answer the premises and abide by and perform such decree or decrees as may be passed therein.

And, as is duty bound.

[SEAL.] THE BALTIMORE TRUST AND GUARANTEE COMPANY, *Trustee*,
By ROBERT C. DAVIDSON, *President*.

STEELE, SEMMES & CAREY,
Solicitors for Plaintiff.

UNITED STATES OF AMERICA, }
District of Maryland. }

I hereby certify that on this 13th day of April, in the year eighteen hundred and ninety-three, before the subscriber, a commissioner of the United States for the district of Maryland, personally appeared Rob't C. Davidson, president of the Baltimore Trust and Guarantee Company, and made oath in due form of law that the matters and things set forth and contained in the foregoing bill of complaint are true and *bona fide* as therein set forth to the best of his knowledge, information, and belief.

ROB'T LYON ROGERS,
U. S. Commissioner for Maryland.

21 Ordered by the circuit court of the United States for the district of Maryland, sitting as a court of equity, this 15th day of April, 1893, on the foregoing bill of complaint, exhibits, and affidavit—

I. That the motion of the plaintiff for a restraining order, restraining the defendant, its officers, agents, and employés, from tearing up or interfering with the single track and switch of the said Lake Roland Company as now laid on Lexington street or from interfering with the said Lake Roland Company in the completion of its crossings, curves, special work, etc., necessary to connect up said track and prepare it for the operation of the cars of the said company, and the motion of the plaintiff for a preliminary injunction to restrain the defendant, its officers, agents, and employés, from interfering with the said Lake Roland Company in the construction and maintenance of two tracks on Lexington street between Charles street and North street and the operation of the cars of the said Lake Roland Company be, and the same are hereby, set for hearing before this court on April 29th, 1893.

II. That the plaintiff shall have until April 21st, 1893, to file any affidavits it may desire to file in support of said motion, and that the defendant shall have until April 27th, 1893, to file its answer, if it desires to file one, and any affidavit it may desire to file in opposition to said motion, and the plaintiff shall have until the
22 day of hearing to file any affidavits it may desire to file in reply.

Provided that a copy of the above bill of complaint and of this order be served upon the defendant or its solicitors on or before April 18th, 1893.

THOS. J. MORRIS, *Judge.*

23 "PLAINTIFF'S EXHIBIT NO. 1."

Filed April 15, 1893, with the bill of complaint.

Mortgage from Lake Roland Elevated Railway Company to the Baltimore Trust and Guarantee Co., trustee.

This indenture, made this first day of September, in the year eighteen hundred and ninety-two, by and between the Lake Roland Elevated Railway Company, a corporation duly created and organized under the laws of the State of Maryland, and hereinafter called the "railway company" of the first part and the Baltimore Trust and Guarantee Company, a corporation duly created and organized under the laws of said State, trustee as hereinafter set forth, and hereinafter called the "trustee," of the second part:

Whereas, the said railway company, the party of the first part hereto, is a railroad corporation existing under and in pursuance of the laws of the State of Maryland, having been created as such corporation by an agreement of consolidation made on the twentieth day of April, in the year eighteen hundred and ninety-two, between the North Avenue Railway Company of Baltimore City and the Baltimore, Hampden and Lake Roland Railroad Company, which said agreement of consolidation was sanctioned by the stockholders of both of said constituent corporations at special meetings held at their respective general offices in the city of Baltimore on said twentieth day of April, in the year eighteen and ninety-two, and was duly filed according to law for record in the office of the secretary of state of the State of Maryland on the said twentieth day of April, in said year:

And whereas, the board of directors of the said railway company, the party of the first part hereto, at a meeting duly called and held, as provided by law, at the general office of the said company, in the said city of Baltimore, on the third day of August, in the year eighteen hundred and ninety-two, adopted the following resolutions:

24 Whereas, in order to provide the necessary funds for the construction, improvement, extension and equipment of the property and railroad of the Lake Roland Elevated Railway Company, and to construct and provide the tracks, bridges, terminal

facilities, cars, motors, equipment, and all other structures and works necessary for the proper working, use and operation of the said railroad, it is necessary for this company to borrow money upon mortgage and to issue its negotiable bonds therefor:

Resolved, That the Lake Roland Elevated Railway Company make and issue its bonds payable to bearer, or to the registered owner thereof, for the aggregate amount of one million dollars, which bonds shall be of the denomination of one thousand dollars each, payable in gold coin of the United States of America, of the present standard of weight and fineness, and shall be numbered consecutively from one to one thousand inclusive, and shall bear interest at the rate of five per cent. per annum, payable semi-annually on the first days of March and September in each year and shall become due and payable on the first day of September, in the year nineteen hundred and forty-two:

Resolved, That for the purpose of securing the payment of the said bonds and the interest which shall accrue thereon, this company shall make, execute and deliver to the Baltimore Trust and Guarantee Company, trustee, a mortgage upon all the property and franchises of the said railway company, which the said corporation acquired by virtue of the agreement of consolidation between the North Avenue Railway Company of Baltimore City and the Baltimore, Hampden and Lake Roland Railroad Company, and also the railroad property, franchises, rights of way, equipment, tolls and incomes, real and personal property, rights of trackage and contracts therefor, owned, vested in or controlled by the said Lake Roland Elevated Railway Company under or by virtue of the aforesaid agreement of consolidation, or under or by virtue of any ordinances of the mayor and city council of Baltimore or acts of the General Assembly of Maryland, or under or by virtue of any contracts, deeds, leases or assignments relating to or enuring to the benefit of the said Lake Roland Elevated Railway Company, or the said North Avenue Railway Company of Baltimore City or the said Baltimore, Hampden and Lake Roland Railroad Company and all other property rights or franchises of the said Lake Roland Elevated Railway Company of every kind, nature or description, now owned or used by the said railway company, and all property, real and personal, now owned by the said railway company in connection with said railways or any of them, and all property which shall be substituted therefor, or acquired or purchased for said railways, or any of them, during the existence of this mortgage and all roads and railways which may hereafter be built under any of the franchises now owned by said railway company, and particularly all power-houses, engines, motors, dynamos, cars, machinery and apparatus which shall be erected, constructed, purchased, acquired, used, owned, or leased by the said railway company for or with relation to its said railways or any of them, and all other franchises and property of every kind and description of the said Lake Roland Elevated Railway Company, the said North Avenue Railway Company of Baltimore City and the said Baltimore, Hampden and Lake Roland Railroad Company.

Resolved, That the said mortgage shall be executed in trust for the benefit of and security for the holders of said bonds to
26 the extent aforesaid without preference, priority or distinction as to lien or otherwise, and that the president and secretary be and they are hereby authorized, empowered and directed for and on behalf of this company to cause its corporate seal to be affixed to each of said bonds and to sign the same as such president and secretary and when so executed to deliver the same to said trustee, and in the execution of the coupons attached to said bonds the signature of the secretary of this company engraved thereon shall be regarded and treated in all respects, in fact and in law as equivalent to the manual signing thereof.

Resolved, That the bonds to be issued and the coupons to be attached thereto shall be substantially in the form following, to wit:

No. —. UNITED STATES OF AMERICA, $1,000.00.
State of Maryland.

The Lake Roland Elevated Railway Company Five per Cent. First Consolidated Mortgage Gold Bond.

Total issue, $1,000,000.00.

For value received the Lake Roland Elevated Railway Company promises to pay to bearer, if not registered, or to the registered owner, if registered, the sum of one thousand dollars, at the office of the said company in the city of Baltimore, in lawful gold coin of the United States of America of the present standard of weight and fineness on the first day of September in the year nineteen hundred and forty-two, with interest thereon in the meantime at the rate of five per cent. per annum, payable semi-annually in like gold coin in the said city on the surrender of the annexed coupon.

The principal and interest of this bond are payable without deduction for any tax or taxes which may be payable on ac-
27 count thereof under any present or future laws of the United States of America, or of the State of Maryland for national, State or municipal purposes, the railway company hereby agreeing to pay any such tax or taxes, which it may now or hereafter be required by any such law to retain therefrom.

This bond is one of a series of this date, aggregating one million dollars, each for one thousand dollars, numbered from one to one thousand, secured by and subject to all the provisions of a mortgage to the Baltimore Trust and Guarantee Company, trustee, bearing even date herewith, of all the property and franchises of the Lake Roland Elevated Railway Company (formed by the consolidation of the North Avenue Railway Company of Baltimore City and the Baltimore, Hampden and Lake Roland Railroad Company) in Baltimore city and Baltimore county, in the State of Maryland, which property and franchises are more particularly described in said mortgage, which is duly recorded among the land records of the

city of Baltimore and the mortgage records of Baltimore county, to which mortgage reference is made for the provisions thereof.

This bond may be registered in the name of the owner thereof on the books of the said railway company at its general office in the city of Baltimore, which registration shall be noted thereon by the company's transfer agent, and thereafter no transfer of this bond shall be valid unless made on said books of the company by the owner in person or by his attorney duly authorized according to the rules established by the company for that purpose, but the same may be registered to bearer and thereafter shall be transferable by delivery until again registered in the owner's name as before. The registration of the bond shall not affect or restrain the negotiability of the coupons by delivery merely.

28 If default shall be made in the payment of any instalment of interest on any of such bonds the principal hereof may be made due and payable as provided in said mortgage.

This bond shall not become obligatory until the certificate hereon be duly signed on behalf of the trustee named in the aforesaid mortgage.

In witness whereof, the said Lake Roland Elevated Railway Company has caused its corporate seal to be hereto affixed and the same to be attested by the signatures of its president and secretary this first day of September in the year eighteen hundred and ninety-two.

THE LAKE ROLAND ELEVATED RAILWAY COMPANY,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

And to each of said bonds shall be attached as part thereof coupons for the semi-annual instalments of interest to be paid thereon until maturity, substantially in the form following, to wit:

$25.00. No. —.

The Lake Roland Elevated Railway Company will pay to bearer at the office of the Baltimore Trust and Guarantee Company in the city of Baltimore, twenty-five dollars in gold coin of the United States of America, on the first day of ——, 1—, being six months' interest on its first consolidated mortgage gold bond, No. —.

—— ——, *Secretary.*

Resolved, That none of the bonds to be issued by the said railway company, as aforesaid, are to be deemed to be issued under this mortgage, or to be entitled to the benefit of the security

29 thereof, or to be obligatory upon the said railway company, as evidence of debt or otherwise, unless and until the party of the second part hereto, as such trustee, or its successor or successors in the trust hereby created, shall have authenticated the same as being so issued and secured, by signing a certificate endorsed thereon substantially in the form following, to wit:

Trustee's Certificate.

This bond is one of a series of one thousand bonds of one thousand dollars each, secured by a duly recorded mortgage from the Lake Roland Elevated Railway Company.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, *Trustee*,

By —— ——, *President.*

And whereas, at said meeting of the directors of the said Lake Roland Elevated Railroad Company, the form of this mortgage was submitted by the president and entered upon the minutes, and it was unanimously

Resolved, That the form of mortgage submitted by the president is hereby approved, and that such mortgage be made and executed by this company under its corporate name, subscribed by its president, and its corporate seal thereto affixed, attested by its secretary, and when so executed, that it shall be duly acknowledged so as to entitle it to be recorded in accordance with the laws of the State of Maryland, and when so acknowledged that it is to be delivered to said trustee and duly recorded; and that the president, secretary and other proper officers do and cause to be done all acts necessary, proper or expedient to carry into effect the objects and purposes expressed in said resolution and to perfect the said issue of bonds and the mortgage to secure the same:

And whereas, at a meeting of the stockholders of the Lake Roland Elevated Railway Company, duly called in conformity with law and held at the general office of the said company in the city of Baltimore on the sixth day of August, in the year eighteen hundred and ninety-two, the proposed issue of said one million dollars of bonds under this mortgage (the form of which was then exhibited to said meeting and approved) was authorized and approved:

Now therefore, this indenture witnesseth, that the said Lake Roland Elevated Railway Company, for the purpose of securing the payment of the principal and interest of said bonds, when and as the same shall become due and payable, according to the tenor and effect of said bonds so made and executed, and in consideration of the premises, and of the sum of one dollar, lawful money of the United States of America, to it in hand paid by the said party of the second part, at the time of the execution and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, set over, released, conveyed and confirmed, and by these presents does grant, bargain, sell, assign, set over, release, convey and confirm unto the said Baltimore Trust and Guarantee Company, and to its successor or successors in the trust hereby created, and to its, his or their assigns, all and singular the railway and the railway tracks owned, used, occupied, possessed or enjoyed by the said railway company as at present located, or, as they may be hereafter located, improved and constructed, and all

the property and franchises of the said railway company, which the said corporation acquired by virtue of the agreement of consolidation between the North Avenue Railway Company of Baltimore City and the Baltimore, Hampden and Lake Roland Railroad Company, and also the railroad property, franchises, rights of way,
31 equipment, tolls and incomes, real and personal property, rights of trackage and contracts therefor, owned, vested in or controlled by the said railway company under or by virtue of the aforesaid agreement of consolidation, or under or by virtue of any ordinances of the mayor and city council of Baltimore or acts of the General Assembly of Maryland, or under or by virtue of any contracts, deeds, leases or assignments relating to or enuring to the benefit of the said railway company, or the said North Avenue Railway Company of Baltimore City or the said Baltimore, Hampden and Lake Roland Railroad Company, or otherwise, howsoever, and all other property, rights or franchises, of the said railway company of every kind, nature or description, now owned or used by the said railway company, and all property real and personal now owned by the said railway company in connection with said railways, or any of them and all property which shall be substituted therefor, or acquired or purchased for said railways, or any of them, during the existence of this mortgage, and all roads and railways which may be built hereafter under any of the franchises now owned by said railway company, and particularly all power-houses, engines, motors, dynamos, cars, machinery and apparatus erected, constructed, purchased, acquired, used, owned, or leased by the said railway company for or with relation to its said railways or any of them, and all other franchises and property of every kind and description of the said railway company, the said North Avenue Railway Company of Baltimore City and the said Baltimore, Hampden and Lake Roland Railroad Company, and including particularly the line of railway authorized to be constructed by the North Avenue Railway Company of Baltimore City by virtue of the ordinances of the
32 mayor and city council of Baltimore and the acts of the General Assembly of Maryland, beginning for the same at the intersection of Lexington street with Charles street in the city of Baltimore, and running thence easterly on Lexington street to North street, thence southerly on North street to Fayette street, thence northerly on North street and Guilford avenue to North avenue, thence westerly on North avenue to Twelfth street, thence northerly on Twelfth street to Clifton avenue, thence westerly on Clifton avenue to Fifteenth street, and thence over private rights of way to the Windsor Mill road; and also the line of railway authorized to be constructed by the Baltimore, Hampden and Lake Roland Railway Company by the acts of the General Assembly of Maryland, beginning for the same at the intersection of North avenue and Oak street in said city of Baltimore, so as to connect with the tracks used, or to be used by the North Avenue Railway Company of Baltimore City; thence north along Oak street to Fourth street or Shirk street; thence west on Fourth street to Hampden avenue (or street), thence north on Hampden avenue to Fifth or Sumwalt

street; thence west on Fifth street three hundred feet, more or less, to the intersection of said Fifth street with the right of way described in a deed from Hugh Sisson *et al.*, to the Baltimore, Hampden and Lake Roland Railroad Company, which deed is recorded among the land records of Baltimore city, in Liber J. B. No. 1368, folio 287; thence northerly along said right of way described in said deed and over such private property as said Baltimore, Hampden and Lake Roland Railroad Company should acquire by purchase or condemnation, to Cedar avenue; thence northerly along Cedar avenue to Merryman's lane; thence westerly along Merryman's lane to Roland avenue; thence northerly along Roland avenue crossing Lake avenue;
33 thence northerly and westerly to the property owned by Richard McGill, described in a deed dated August 7th, 1886, and recorded among the land records of Baltimore county in Liber E. H. A. No. 59, folio 123, over Roland avenue, when opened, or over such property as the said company should acquire by purchase or condemnation, or at the election of the company, from the intersection of Cedar avenue and Second avenue, westerly along said Second avenue and over such private property as it may acquire by purchase or condemnation, to Elm avenue; thence northerly on Elm avenue to Merryman's lane, and thence by the route above defined to the property of Richard McGill, above referred to, together with the side tracks, switches, bridges, trestles, elevated railway structures (including especially the elevated railway or structure to be erected on North street under the ordinance of the mayor and city council of Baltimore approved April 8, 1891, as ratified and confirmed by the act of 1892, chapter 112, of the acts of the General Assembly of Maryland) and all the rights, appurtenances, privileges and franchises appertaining to said lines of railway.

To have and to hold all and singular the above-described premises, property, rights, privileges, franchises and appurtenances unto the said The Baltimore Trust and Guarantee Company, its successors and assigns forever in the trust hereby created, to and for the only proper use, benefit and behoof of the said The Baltimore Trust and Guarantee Company, its successors or assigns, but in trust, nevertheless, it being expressly covenanted and agreed by and between the parties hereto, the said railway company covenanting as well for itself as for its sucessors or assigns and the said The Baltimore Trust and Guarantee Company covenanting as well for itself as for
34 its successors or assigns, that the above-described premises, property, rights, privileges, franchises and appurtenances are granted and are to be held by the said The Baltimore Trust and Guarantee Company upon and for the trusts, uses and purposes, and subject to the covenants, terms and conditions which are herein set forth, that is to say:

Article I. That this mortgage is executed for, and the trust hereby created is to enure to the equal benefit and security of all and every the persons or bodies corporate who shall be or at any time become the holders of said bonds, or such of them as shall be issued by the party of the first part, without preference, priority or distinction as to lien or otherwise of any of the said bonds over the others by

reason of priority in the time of issuing the same, and so that each and all of the said bonds issued, and to be issued as aforesaid, shall have the same right, lien and privilege under and by virtue of this mortgage, and shall all be equally secured hereby with like effect as if they had all been made, executed and delivered simultaneously with the delivery hereof.

Article II. Until default shall be made by the party of the first part in the payment of the principal or interest of the said bonds, or any of them, according to the tenor and effect of the said bonds and of this mortgage, and on the days, times and place mentioned therein respectively without further delay or until default be made by the party of the first part in respect to some act or thing, covenant or agreement in any of the said bonds, or herein required to be done, kept and performed, the party of the first part shall be permitted to possess, manage, operate, use and enjoy all and singular said railroads and property, with the appurtenances thereto, hereinbefore described.

35 Article III. If the party of the first part, its successor, successors or assigns, shall at any time *time* hereafter, after demand made, make default, or refuse, neglect, or omit for any period exceeding sixty days, to pay the semi-annual interest on the bonds intended to be hereafter secured, or any of them, or shall after demand made, make default, or refuse, neglect or omit for any period after the maturity thereof to pay the principal sum of each and all of the said bonds, or shall suffer or allow any lawful taxes or charges to remain in arrear for six months, or any lien to be obtained on the said railroad and property, whereby the security of this mortgage may be impaired, or shall refuse or fail to keep or perform any of the covenants and stipulations contained herein, or in the bonds secured or intended to be secured hereby, and on its part to be kept and performed, then, and in any of such events, the party of the second part shall, upon the written request of the holders of a majority in amount of the said bonds secured hereby and then outstanding, and upon adequate security and indemnity against all costs, expenses and liabilities to be by the party of the second part incurred, and not otherwise, forthwith demand and, with such force as may be necessary, enter upon, take and maintain possession of all and singular the railroads, and all the estate, premises, rights, contracts and franchises hereby conveyed and mortgaged, or agreed or intended so to be, and, as the attorney in fact or agent of the said party of the first part, by its agents and substitutes duly constituted, or by its managers, superintendents, receivers or servants have, hold, use, manage, operate and enjoy the same, and each and every part thereof, to as full an extent as the party of the first part might lawfully do, making from time to time all needful and proper repairs, alterations and additions, and receiving all tolls, income and revenue thereof, and after deducting the expenses of

36 such use, operation, reasonable repairs, alterations and additions, all lawful taxes and assessments on said railroads and property, and the costs or charges of such taking possession, and proper compensation for its services for such taking possession, and

management while in possession, and such sums as may be sufficient to indemnify it against any liability, loss or damage, for or on account of any matter or thing done by it in good faith and in pursuance of its duties as said trustee, the party of the second part shall apply the remaining net income and revenue therefrom, without giving preference, priority or distinction to one bond over another, to the payment,

First, of the interest due on the bonds then outstanding hereby secured or intended so to be in full, in the order in which such interest shall become due thereon.

Second, in case the principal of said bonds shall have become due, according to the tenor and effect of said bonds, or of these presents, then to the payment of the principal of said bonds in full, if the said income and proceeds be sufficient, but if not then *pro rata.*

Or the said party of the second part shall and will after or without entering upon or taking such possession, upon the written request of holders of a like amount of said bonds then outstanding, and upon like security and indemnity, and not otherwise, proceed to sell and dispose of all and singular the said railroads, estate, real and personal, corporate rights, franchises and premises hereby mortgaged, or agreed or intended so to be, to the highest and best bidder at public auction in the city of Baltimore, or at such place as the said trustee may designate, and at such time as it shall appoint, having first given notice of the time and place of such sale by advertisement published not less than twice in each week for sixty days in one or more newspapers published in the city of Baltimore, or to
37 adjourn said sale from time to time in its discretion, and after so adjourning to make such sale at the time and place to which the same may be so adjourned, and to make and deliver to the purchaser or purchasers of the said railroads and their appurtenances, and all other the said property and franchises thereto belonging, good and sufficient deed or deeds in the law, free from all and every of the trusts hereby created, and without obligation to inquire into the necessity, expediency or authority of or for any such sale, which sale so made as aforesaid shall be a perpetual bar both in law and in equity against the party of the first part, and all persons claiming or to claim the said described premises and property, or any part thereof, or any interests therein, by, from, under or through the party of the first part, and after deducting from the proceeds of such sale, proper allowances for all the expenses thereof, including attorney and counsel fees, and all other expenses, or liabilities which may have been paid or incurred by it for taxes or assessments on the said railroads, or the appurtenances, or other property thereto belonging, or any part thereof, as well as reasonable compensation for its own services, it shall be lawful for the trustee, and it shall be its duty, to apply the residue of the money arising from the said sale, without giving preference, priority or distinction to one bond over another, to the payment of the whole amount of the unpaid principal of said bonds then outstanding and of the whole amount of the interest which shall, at that time, have accrued and be unpaid, *pro rata,* without preference

or priority, and ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest. And in the event of there being in the hands of the trustee any portion of the trust estate, or the proceeds thereof, after the payment in full of the
38 principal and interest of such bonds, then the trustee shall reconvey, transfer and pay over such surplus to the party of the first part, its successor, successors or assigns, for its or their sole use and benefit.

Or the said trustee shall and will, upon the written request of the holders of a like amount of said bonds then outstanding, and upon like security and indemnity, and not otherwise, proceed to protect and enforce the rights of the bondholders under these presents by a suit or suits in equity or at law, whether for the foreclosure of this mortgage or for the specific performance of the stipulated covenants, trusts, conditions and agreements, or any of them contained herein, on the part of the party of the first part to be kept and performed, whether in aid of the execution of the powers herein granted or otherwise, as the trustee, being advised by counsel learned in the law shall deem most effectual to protect and enforce such rights; it being understood, and it is hereby expressly declared, that the rights of entry and sale hereinbefore granted are intended as cumulative remedies, additional to all other remedies allowed by law, and that the same shall not be deemed in any manner whatever to deprive the trustee or the beneficiaries under this trust of any legal or equitable remedy by judicial proceedings consistent with the provisions of these presents, according to the true intent and meaning thereof.

Article IV. And it is hereby expressly declared and agreed that no holder or holders of a bond or of any bonds or coupons secured hereby shall have the legal right to institute any suit, action or proceeding in equity or in law for the foreclosure of this mortgage, or the execution of the trust thereof, or for the appointment of a receiver, without first giving thirty days' notice in writing to the trustee of the fact that default has occurred and continued as aforesaid, nor unless the holders of a majority of the said bonds
39 then outstanding have made the request in writing to the trustee as above provided, and have afforded it a reasonable opportunity to proceed to execute the powers hereinbefore granted, or to institute such action, suit or proceeding in its own name, and have also offered to it adequate security and indemnity against the costs, expenses and liabilities to be incurred therein and thereby, and such notification, request and offer of indemnity are hereby declared to be conditions precedent to any action or cause of action for the foreclosure of the said mortgage or for the application for the appointment of a receiver, it being understood and intended that no one or more holders of bonds or coupons shall have the right in any manner whatever, to affect, disturb or prejudice the lien of this mortgage by his or their action, except in the manner herein provided, but that all proceedings in law or equity shall be instituted, had and maintained for the equal benefit of all holders of said bonds and coupons outstanding.

Article V. And it is hereby further covenanted and agreed that neither the trustee, its successor or successors or holder or holders of the bonds or coupons secured or intended to be secured hereby, or any of them, shall sell the premises hereby mortgaged, or intended so to be, or any part thereof, or institute any suit, action or proceeding in law or equity for the foreclosure thereof, otherwise than in the manner herein provided.

Article VI. And it is further covenanted and agreed that if the party of the first part, its successor, successors or assigns shall, at any time hereafter, after demand made, make default or refuse, neglect or omit, for any period exceeding sixty days, to pay the semi-annual interest on the bonds intended to be hereby secured, or any of them, then the holders of a majority in amount of the
40 said bonds outstanding may elect to declare the whole principal sum thereof to be due and payable, and may, by an instrument or concurrent instruments in writing under their hands, instruct the said trustee to declare said principal sum to be due and payable, whereupon the whole principal sum of each and all of said bonds then outstanding shall forthwith be due and payable, notwithstanding that the time limited therein for the payment thereof may not then have elapsed; but such declaration, making said principal sum to become due, may be annulled or reversed before the entry of any decree of sale under this mortgage in any judicial proceeding and before the advertisements of any sale hereunder by the trustee, by the holders of a like majority of the said bonds secured or intended to be secured hereby, by an instrument or concurrent instruments in writing under their hands, instructing the trustee to annul or reverse such declaration, and the said trustee shall thereupon declare the same to be annulled and reversed, and thereafter the said bonds shall continue to run in the same manner as they would have done had not such original election been made. Provided always, and it is hereby declared, that no such action of the trustee or bondholders shall extend, or be taken to affect any subsequent default, or impair the rights resulting therefrom; and in the event of any sale of the railroads, estates, real and personal, hereby mortgaged, or agreed or intended so to be, either by the trustee or by judicial proceedings, as hereinbefore mentioned, or in the event of the entry of any decree of sale under this mortgage in such judicial proceedings, then, and in either such case, the whole principal sum of each and all of the said bonds then outstanding and intended to be hereby secured shall forthwith be due and payable, notwithstanding that the time limited therein for the payment thereof may not then have elapsed; and in no other case and
41 for no other purpose, except as in this article provided, shall the principal sum of any of said bonds become due and payable before the date fixed in such bonds for the payment thereof. This provision is expressly declared not to be in the nature of a penalty for a breach of condition or for the non-payment of interest, but to be a provision which, having regard to the nature of the mortgaged premises, and the impossibility of a sale thereof in par-

cels, without serious prejudice to all interests, is essentially necessary to effectuate the objects and purposes of the parties hereto.

Article VII. And it is further expressly covenanted and agreed that at the sale of the aforesaid railroads, property, franchises or appurtenances, or of either or any part thereof, hereinbefore conveyed, made by virtue of the power hereinbefore granted, or by judicial authority for the purpose of enforcing the lien of these presents, the party of the second part, its successor or successors, may, with the assent in writing of the holders of at least one-half of the bonds hereby secured and then outstanding, or their agents or trustees, personally, or by agent or attorney, bid for, and, if the same be attainable at the price hereinafter mentioned, purchase and acquire the property so offered for sale on behalf of all holders of the bonds secured by this instrument which may then be outstanding, in proportion to the respective interests of such holders in the said bonds and the coupons thereto belonging, provided, however, that nothing herein contained shall authorize the said trustee to bid on behalf of the holders of said bonds a sum exceeding the whole amount of the said bonds then outstanding, with the interest accrued thereon, and the expenses of such sale, for the entire property then held upon the trust of this instrument, or an amount reasonably proportionate thereto for any part of the said property.

42 And it is hereby further agreed that the bonds and overdue coupons aforesaid shall be received in payment of the purchase-money of any property sold at such sale as equivalent to so much of the said purchase-money as would be distributable and payable thereon.

Article VIII. The party of the first part hereby covenants and agrees with the said trustee, party of the second part, its successor or successors, that it the party of the first part, or its successor, successors or assigns, from time to time, and at all time, upon reasonable request, shall and will make, execute and deliver, at its own expense, all such further acts, deeds, conveyances and assurances in law for the better assuring unto the said trustee and its successor or successors in the trust hereby created upon the trusts and for the purposes herein expressed or intended, all and singular the railroads, property, real or personal, rights, privileges and franchises hereby mortgaged or conveyed in trust or intended so to be, as by the said party of the second part, or its counsel learned in the law, shall be reasonably advised or required.

Article IX. And it is further expressly covenanted and agreed that the party of the second part, its successor or successors, shall at any and all times during the continuance of the trust hereby created, have full power and authority, to be exercised in its discretion, to release to any party or parties who may be designated in writing by the party of the first part, its successor or successors or assigns, free from the operation and lien of these presents, any part of the hereby mortgaged property which in the judgment of the party of the first part shall be unnecessary for use in connection with the operation and maintenance of the said railroads and their business, or which may become disused by reason of the change in the location

of any part of said railroad, or any station-house, depot, shop
43 or other building connected with the said railroads; provided, always that the proceeds of any sale, exchange, lease or other disposition of the property so released from the operation of this mortgage shall be invested by the party of the first part, either in the improvement of the remaining part of the mortgaged premises, or the purchase by it of other property, real or personal, which property so purchased, as well as any that may be acquired in exchange as aforesaid by the party of the first part, shall be subject to the lien and operation of these presents.

And the said party of the first part, its successor or successors or assigns, shall have full power from time to time to dispose of any portion of the rails on its railroads, or, cars, motors, dynamos or other equipment, machinery, tools and implements or other personal property other than leasehold interest in land, which shall be at any time held or acquired for the use of the party of the first part, its successor or successors or assigns, and which shall, in its judgment, not be required for the proper and judicious operating, management or maintenance of its railways; provided, however, that so far as necessary the material and equipment, so disposed of shall be replaced by other material or equipment, which shall be subject to the lien and operation of these presents.

Article X. The party of the first part hereby agrees to waive, and does hereby irrevocably waive the benefit and advantage of any and all stay, exemption, extension, valuation and appraisement laws now existing, and which may hereafter be passed by the United States or of the State of Maryland or the city of Baltimore, which may or might prevent, postpone, hinder or delay the exercise of the right of the party of the second part to enter upon, operate or sell the mortgaged premises on any part thereof, or to commence
44 or to continue any action or proceeding in regard thereto, or the exercise of any powers, rights, privileges and remedies of the party of the second part or any of the bondholders under and in accordance with the provisions hereof. The party of the first part hereby expressly covenants and agrees not to claim, set up or take the benefit or advantage of any such law or laws. And the party of the first part hereby also covenants and agrees, that it will pay, or cause to be paid, all taxes and assessments on the property and premises hereby conveyed as and when they shall be and become due and payable.

Article XI. And it is hereby further covenanted and agreed and the trusts created by this instrument are accepted upon the express condition that the trustee shall not incur any liability or responsibility whatever in consequence of permitting or suffering the party of the first part to retain or be in possession of the railroads, estate and premises hereby mortgaged or agreed or intended so to be, or any part thereof, and to use and enjoy the same; nor shall the trustee be or become responsible or liable for any destruction, deterioration, loss, injury or damage which may be done or occur to the railroads and estates hereby mortgaged or agreed or intended so to be, either by the party of the first part or its agents or servants, or by

any other person or persons whomsoever, nor shall the trustee be in any way responsible for the consequences of any breach on the part of the party of the first part of any of the covenants herein contained, nor of any act of the party of the first part, its agents or servants; nor shall the trustee be held liable for any act, default or misconduct of any agents or persons employed by it unless chargeable with gross negligence in the selection or continuance of their employment nor shall such trustee be answerable except for its own wilful default or gross misconduct; and in
45 case the trustee shall go into possession of said mortgaged premises, and operate the same as hereinbefore provided, it shall be indemnified out of the funds and property which shall come into its hands as aforesaid, for all claims and demands against it arising from negligence, carelessness or misconduct of its officers, agents and employees, and in all cases the trustee shall be authorized to pay such reasonable compensation as may be proper to all all attorneys, servants and agents whom it may reasonably employ in the management of the trust; and the trustee shall be entitled to and shall have just compensation for all services which it may render hereafter in connection with the trust, to be paid by the party of the first part or out of the estate; the trustee may resign from the trust by notice in writing to the party of the first part and to all known bondholders at least sixty days before such resignation shall take effect, or such shorter time as may be accepted as sufficient notice, and upon the execution and delivery, if such shall be required, of the deed of conveyance and transfer to a successor in trust.

In case at any time hereafter the said trustee or any trustees hereafter appointed shall resign or be removed by a court of competent jurisdiction or otherwise, or shall become incapable or unfit to act in the said trust, the successor or successors of the said trustee shall be appointed by the holders for the time being of a majority in interest of the bonds secured hereby and outstanding, by an instrument or concurrent instruments signed by said bondholders or their attorneys-in-fact duly authorized, provided, nevertheless, and it is hereby agreed and declared that in case it shall at any time prove impracticable after reasonable exertion to appoint in the manner hereinbefore provided a successor in the event of a vacancy in said trust, the new trustee may be appointed upon appli-
46 cation to any court of competent jurisdiction in which any part of the mortgaged property may be situated, upon application of the holders of one eighth in interest of the amount of said bonds then outstanding.

Any new trustee so appointed shall thereupon become vested with all the estate, properties, rights, powers and trusts granted to or conferred upon the party of the second part by these presents with like effect as if named as trustee herein, and the trustee so resigning or removed shall, on the written request of the new trustee who may be appointed, immediately execute a deed or deeds of conveyance to vest in such new trustee upon the trusts herein expressed, all the

property, privileges and rights which may at any time be held upon said trust.

Proof of the execution of an instrument appointing a new trustee or any request in writing or other instrument herein provided for to be executed by bondholders, shall be sufficient for the purposes hereof, if made in the following manner: The amount of bonds held by persons signing any such instrument may be proved by the certificate of the trustee, or any depository approved by the trustee or the party of the first part, that the bonds were deposited by such persons with the trustee or such depositary on the day of the date of such instrument.

The fact and date of the execution by any person of any such instrument may be proven by the certificate of the trustee, or by the certificate of any notary public or other officer, in the United States or elsewhere, authorized to take the acknowledgment of deeds to be recorded in the State of Maryland, that the person signing such request or other instrument acknowledged to him the execution thereof.

Article XII. Any of the bonds secured hereby may, at any
47 time, on payment of the fee established therefor, be registered, under such regulations as the party of the first part may establish in the name of the holder, on the books of the said party of the first part at Baltimore, or such other place or places of registration as it may designate, and such registration may from time to time, on complying with such regulations, be extinguished and cancelled and again renewed; but, after such registration, and while the same remains unextinguished and uncancelled, such bonds can only be transferred by the registered holder, or by his duly authorised attorney, by a proper entry of transfer on the books of the said party of the first part, and an endorsement of such transfer upon the bond. Due extinguishment and cancellation of registration stamped or endorsed upon the bond by the said party of the first part will restore the negotiability thereof by delivery; but this article shall apply to the principal of the bonds and not to the coupons.

Article XIII. In the execution of the coupons secured by these presents, the signature of the secretary engraven thereon shall be regarded and treated as in all respects, in fact and in law, equivalent to a manual signing of the said coupons.

Article XIV. The said trustee herein named shall certify all of the aforesaid consolidated mortgage bonds, and deliver the same to the party of the first part hereto on demand.

Article XV. If the party of the first part shall well and truly pay the sums of money as provided by the said bonds secured hereby, and the coupons thereto attached, required to be paid by it and shall well and truly keep and perform all the covenants, agreements and undertakings herein and hereby assumed and required to be kept and performed according to the true intent and meaning of these presents, then and in that case the estate, right, title and in-
48 terest of the said party of the second part, trustee, or its successor or successors, shall cease, determine and become void.

And the said Lake Roland Elevated Railway Company does

hereby constitute and appoint Francis K. Carey, to be its true and lawful attorney, for it and in its behalf to acknowledge these presents as its corporate act and deed, to the intent that the same may be recorded according to law; and the said The Baltimore Trust and Guarantee Company does hereby constitute and appoint Henry W. Warner, to be its true and lawful attorney, for it and in its behalf to acknowledge these presents as its corporate act and deed, to the intent that the same may be recorded according to law.

In witness whereof, the said Lake Roland Elevated Railway Company and the said The Baltimore Trust and Guarantee Company have hereunto affixed their corporate seals, attested by the signatures of their respective presidents and secretaries, the day and year first-above writtem.

[Seal of Lake Roland Elevated Railway Company.]

LAKE ROLAND ELEVATED RAILWAY COMPANY,
By SAMUEL M. JARVIS, *President.*

Attest: EDWARD H. BOUTON, *Secretary.*

[Seal of the Baltimore Trust and Guarantee Company.]

49 THE BALTIMORE TRUST AND GUARANTEE COMPANY,
By ROBERT C. DAVIDSON, *President.*

Attest:

CHAS. W. BAER, *Secretary.*

Signed, sealed, and delivered in the presence of—
WM. F. LEBER.
A. S. KEMP.

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

I hereby certify that on this thirtieth day of September, in the year eighteen hundred and ninety-two, before me, the subscriber, a justice of the peace of the State of Maryland, in and for Baltimore city aforesaid, personally appeared Francis K. Carey, the attorney appointed in the foregoing instrument by the Lake Roland Elevated Railway Company and acknowledged the said instrument to be the corporate act and deed of the said Lake Roland Elevated Railway Company; and at the same time also personally appeared before me
50 Henry W. Warner, the attorney appointed in the aforegoing intrument by the Baltimore Trust and Guarantee Company, trustee, and acknowledged the said instrument to be the corporate act and deed of the said The Baltimore Trust and Guarantee Company, trustee; and at the same time personally appeared before me also Robert C. Davidson, the president of the said The Baltimore Trust and Guarantee Company, the trustee and mortgagee under the said instrument, and made oath in due form of law that the consideration stated in the aforegoing instrument is true and *bona fide* as therein set forth, and that he is the president, and the duly

authorized agent of the said corporation, trustee and mortgagee under the aforegoing instrument and as such authorized to make this affidavit.

JNO. T. MADDOX, *J. P.*

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

I hereby certify that John T. Maddox, Esquire, before whom the annexed acknowledgments and affidavit were made, and who has thereto subscribed his name, was, at the time of so doing, a justice of the peace of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the handwriting of the said justice, and know the signature to be his genuine signature.

51 In testimony whereof I hereunto set my hand and affix the seal of the superior court of Baltimore city, this thirtieth day of September, in the year eighteen hundred and ninety-two.

[Seal of the Superior Court of Baltimore City.]

JAMES BOND,
Clerk of the Superior Court of Baltimore City.

Received for record Oct. 24, 1892 @ 12.35 o'cl'k p. m. Same day recorded & ex'd—

Per JAS. BOND, *Clerk.*

I hereby certify that the aforegoing is a true copy, taken from Liber J. B., No. 1416, folio 33, &c., one of the land records of Baltimore city.

In testimony whereof I hereto set my hand and affix
[SEAL.] the seal of the superior court of Baltimore city this 12th day of April, A. D. 1893.

JAS. BOND,
Clerk of the Superior Court of Baltimore City.

52 "PLAINTIFF'S EXHIBIT NO. 2."

Filed April 15, 1893, with the bill of complaint.

An ordinance to regulate the use of Lexington street, between North street and Charles street, by railway tracks, and to prohibit the laying, or maintaining, or using by North Avenue Railway Company, or any other person or corporation, of more than a single iron railway track upon said portion of Lexington street.

Whereas by a provision in section 1 of ordinance No. 23, approved April 8th, 1891, and entitled "An ordinance to authorize the construction of city passenger railway tracks by the North Avenue Railway Company on North avenue, from McCulloh street to Guilford avenue, and thence on Guilford avenue and North street to Lexington street, and thence on Lexington street to Charles street,

and on North street to the north side of Fayette street," the North Avenue Railway Company of Baltimore city was authorized and licensed to lay down and construct double iron railway tracks for the purposes of its business on divers streets of the city, among others, on Lexington street, between North street and Charles street; and

Whereas it appears to the mayor and city council of Baltimore, that the public safety and convenience, and the proper regulation of the use of the streets, requires that there shall not be more than one iron railway track laid down, constructed, maintained or used on said portion of Lexington street; and

Whereas the president and other officers of the said North Avenue Railway Company knew, before any expense was incurred by the said company, or before any portion of the work of laying said tracks on said portion of Lexington street had been done, that in the judgment of the mayor and city commissioner, the laying of a double set of iron railway tracks on said portion of Lexington street would be detrimental to the public interest; and that
53 the city's solicitor had given the opinion that the mayor and city council had full power to alter or revoke the authority given by said section 1 of ordinance 23, of April 8, 1891, to lay double iron railway tracks on said portion of Lexington street; and that the mayor would on the earliest practicable occasion recommend the passage of an ordinance altering and revoking the authority to lay such double iron railway tracks on said portion of Lexington street: now therefore

SECTION 1. Be it enacted and ordained by the mayor and city council of Baltimore, That the first section of ordinance No. 23, approved April 8, 1891, so far as the same authorized and empowered the North Avenue Railway Company to lay double iron railway tracks upon the portion of East Lexington street between North street and Charles street, be, and hereby is repealed, and that the authority and license given to said North Avenue Railway Company by said first section of said ordinance to lay such double iron railway tracks, be, and hereby is, revoked.

SEC. 2. And be it further enacted and ordained, That no person or persons, corporation or corporations, under any pretext or under color of authority of any former grant or license, shall, (except as hereinafter provided in the succeeding section of this ordinance), lay down, construct maintain or use any iron railway tracks on that portion of East Lexington street between North street and the east side of Charles street; and any and all iron railway tracks which may have been heretofore, or may be hereafter laid or placed on said portion of Lexington street, (unless laid or suffered to remain under the provisions of the next succeeding section of this ordinance,) shall be removed by the person or persons by whom or by whose direction they were laid, within ten days after they may be notified to that effect by the city commissioner; and in case of the neglect of such person or persons, or corporation, to so re-
54 move such iron railway tracks within the time specified, the same shall be removed by the city commissioner.

SEC. 3. And be it further enacted and ordained, That the said North Avenue Railway Company of Baltimore City, be, and it is hereby, authorized and licensed to lay down, construct, maintain, and use one iron railway track, and no more, on East Lexington street, between North street and Charles street, in a location to be designat*ion* by the city commissioner, upon the same terms and subject to the same provisions and limitations as were provided by the said ordinance No. 23, of April 8th, 1891, in respect to the double iron railway tracks there authorized to be laid on said portion of Lexington street; and any other company shall have the same, but no greater, right to use this single track, that it would have had to use the double track, if this ordinance had not been passed, and the said ordinance No. 23, of April 8th, 1891, had remained unaltered; provided, as a condition precedent to the right of the North Avenue Railway Company to exercise the authority or license in this section conferred upon it, the said North Avenue Railway Company shall within twenty days from the passage of this ordinance, at its own expense, remove the whole or such portion of the double iron railway tracks that it has caused to be laid on said portion of Lexington street, as the city commissioner shall designate, and shall also, at its own expense, replace the pavement on the said portion of East Lexington street in a manner satisfactory to the city commissioner; and provided further, that any switches to connect other tracks with the aforesaid single track which the said North Avenue Railway Company, or any other company having the right to use said tracks, may desire to lay, shall be so laid as not to extend on Lexington street more than fifty feet east of the east side of Charles street, or to be entirely east of the west side of North street, and shall be constructed and laid subject to the approval of the city commissioner.

55 SEC. 4. And be it further enacted and ordained, That this ordinance shall take effect from the date of its passage.

56 PLAINTIFF'S EXHIBIT NO. 3.

Filed April 15, 1893, with the bill of complaint.

In the Circuit Court of Baltimore City.

LAKE ROLAND ELEVATED RAILWAY COMPANY, Plaintiff,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE and ALFRED E. SMYRK, City Commissioner, Defendants.

To the honorable the judge of said court:

Your orator, complaining, says:

I. That by ordinance No. 23, approved April 8th, 1891, of the ordinances of the mayor and city council of Baltimore, your orator was duly authorized to lay down and maintain double electric railway tracks on Lexington street between North street and Charles street upon the terms and conditions fully set forth in said or-

dinance, which is hereby referred to and made part of this bill of complaint.

II. That in pursuance of the power and authority thus conferred upon your orator, and under the supervision and with the express approval of the said Alfred E. Smyrk, city commissioner of Baltimore, your orator constructed its double electric railway
57 tracks on Lexington street between North street and Charles street (with the exception of the special work required for the curves and crossings).

III. That after said construction and by the first section of ordinance No. 1, approved November 18th, 1892, of the ordinances of the said mayor and city council of Baltimore, entitled "An ordinance to regulate the use of Lexington street between North street and Charles street by railway tracks, and to prohibit the laying or maintaining or using by North Avenue Railway Company or any other person or corporation of more than one single iron railway track upon said portion of Lexington street," the said mayor and city council of Baltimore attempted to repeal the said ordinance No. 23, approved April 8th, 1891, so far as the same authorized your orator to lay down double tracks on Lexington street between North street and Charles street; and by the second section of said ordinance it was provided that all tracks laid by your orator on Lexington street between Charles street and Lexington street should be removed by your orator within ten days after they should be notified to that effect by the city commissioner, and that in case of the neglect of your orator to remove such tracks within the time specified the same should be removed by the said city commissioner.

IV. That the third section of said ordinance No. 1, approved November 18th, 1892, provides as follows:

SEC. 3. And be it further enacted and ordained that the
58 said North Avenue Railway Company of Baltimore city be, and it is hereby authorized and licensed to lay down, construct, maintain and use one iron railway track, and no more, on East Lexington street between North street and Charles street, in a location to be designated by the city commissioner, upon the same terms and subject to the same provisions and limitations as were provided by the said ordinance No. 23, of April 8th, 1891, in respect to the double iron railway tracks there authorized to be laid on said portion of Lexington street; and any other company shall have the same, but no greater, right to use this single track that it would have had to use the double track, if this ordinance had not been passed, and the said ordinance No. 23, of April 8th, 1891, had remained unaltered; provided, as a condition precedent to the right of the North Avenue Railway Company to exercise the authority or license in this section conferred upon it, the said North Avenue Railway Company shall, within twenty days from the passage of this ordinance, at its own expense, remove the whole or such portion of the double iron railway tracks that it has caused to be laid on said portion of Lexington street, as the city commissioner shall designate, and shall also, at its own expense replace the pavement

on the said portion of East Lexington street in a manner satisfactory to the city commissioner; and provided further, that any switches to connect other tracks with the aforesaid single track which the said North Avenue Railway Company, or any other company having the right to use said tracks may desire to lay, shall be so laid
59 as not to extend on Lexington street more than fifty feet east of the east side of Charles street, or to be entirely east of the west side of North street, and shall be constructed and laid subject to the approval of the city commissioner.

V. That upon the passage of the aforesaid ordinance No. 1, approved November 18th, 1892, your orator being advised that the said ordinance No. 23, approved April 18th, 1891, constituted a contract between your orator and the said mayor and city council of Baltimore, the terms of which could not be altered by either party without the consent of the other, and the right to maintain double tracks on Lexington street between North street and Charles street being of the greatest value and importance to your orator, your orator thereupon advised Ferdinand C. Latrobe, the mayor of the city of Baltimore, and William Sheppard Bryan, Jr., the city solicitor of the city of Baltimore, that it desired to test the validity of said ordinance No. 1, approved November 18th, 1892, and to bring the questions of law pertaining to the same promptly and fairly before the court of appeals, but that, in view of the time limit contained in the above-recited third section of said ordinance, your orator was fearful that the delay of the litigation might cause a forfeiture of your orator's rights under said ordinance if it should be held to be a valid revocation of your orator's rights under said ordinance No. 23, approved April 8th, 1891. Wherefore your orator stated that inasmuch as both parties desired a speedy and fair
60 determination of questions of law, your orator desired the friendly co-operation of the city authorities with your orator in making up a case to be carried at once on a *pro forma* decree of this honorable court to the court of appeals.

VI. That the said mayor at once expressed his willingness and desire that the matter of law should be presented to the court of appeals at once without the delays incident to the litigation of the case in this honorable court and without prejudice to your orator by reason of the necessary delay of litigation, and requested the said city solicitor to at once co-operate with the solicitors of your orator to make up a case in a spirit of fairness to both parties, with a fair and proper protection of their respective rights and a full and clear presentation of their respective claims, and thereupon the said city solicitor and the solicitor for your orator at once proceeded to conduct the litigation with the above ends in view.

VII. That it was at first proposed that a bill of complaint should be filed by the mayor and city council of Baltimore asking for an injunction to restrain your orator from proceeding with the construction of its tracks on Lexington street, to which bill your orator was to demur and a *pro forma* decree for an injunction to be granted; but that thereafter the said city solicitor requested that

the bill should be filed by your orator and the demurrer by the city, and that finally, at the request of the city counsellor, Thomas G. Hayes, who was then brought into the litigation,
61 it was agreed that the city should answer a bill of complaint filed by your orator, testimony be taken, and a *pro forma* decree refusing the injunction passed by this honorable court, which course was in fact pursued, and the case carried in this manner directly to the court of appeals.

VI-. That, in the spirit of friendly and fair dealing thus mutually controlling the parties to the litigation, a desire was expressed by your orator that the penal clause in the ordinance should be presented directly to the court for its consideration, your orator being advised that it tended to make still more apparent the invalidity of the said repealing ordinance because it reduced it not to a regulation of the tracks as stated in the title of the ordinance, but to an absolute destruction of all the rights of your orator on Lexington street; and with that end in view and at the special request of your orator's solicitors, the said city solicitor dictated a notice to the city commissioner requiring your orator to remove all of its tracks on Lexington street; but as your orator had agreed to take a *pro forma* decree against it in this honorable court without pressing its application for an injunction, it was agreed between the said city solicitor, acting under the advice and approval of the said mayor and on behalf of the mayor and city council of Baltimore, and the solicitors for your orator that said notice was given only to place the company in a position to at once file a bill for an injunction,
62 so that the question of the validity of the ordinance No. 1, approved November 18th, 1892, could be speedily decided, and that it was further agreed distinctly between the said solicitors that said order was not to be complied with; that your orator would not proceed further with its work on Lexington street, and that the city would not tear up the tracks already laid down pending the litigation, and that until there was a decision by the court of appeals matters should stand *in statu quo* without prejudice to the rights of your orator.

IX. That your orator, relying implicitly on the faith of this solemn undertaking by the public officers of the city of Baltimore that if your orator would promote a prompt adjudication of the matter in the manner and form agreed upon your orator's rights were not to be prejudiced by the delay of the litigation, proceeded in good faith and with due diligence to carry out its part of the agreement, and that after argument before the court of appeals the said court, by his honor William Sheppard Bryan, delivered the opinion of the court that said ordinance No. 1, approved November 18th, 1893, was a valid exercise of the powers of the mayor and city council, said decision being rendered on March 16th, 1893, but that in view of a recent decision of the Supreme Court of the United States sustaining the claim of your orator, that the said ordinance No. 23, approved April 18th, 1891, constituted an inviolable contract between your orator and the mayor and city council of Balti-
63 more, your orator has filed a motion for a reargument of the

case before the court of appeals; which motion is now pending before said court, and, in the event of the failure on the part of your orator to procure some satisfactory modification of said opinion at the hands of the court of appeals, it is the purpose of your orator to carry the said case, by writ of error, to the Supreme Court of the United States.

X. That on the day following the rendering of the above decision, before your orator had even been able to secure the full text of said opinion, the said Ferdinand C. Latrobe announced that your orator would be given seven days to take up one of its tracks upon Lexington street, and that the city would remove the said track itself at the end of said seven days unless it was removed by your orator by that time, adding that "the company displayed great celerity in putting the tracks on Lexington street, and that it would have a chance to be as quick in taking the extra track up," and on the following day the said city solicitor, forgetting the agreement with your orator, advised the mayor that the period of twenty days prescribed by the said third section of said ordinance No. 1, approved November 18th, 1892, having expired pending the litigation, *of* your orator had lost all of its rights on Lexington street, and that it could not maintain any tracks on Lexington street without additional authority from the mayor and city council; whereupon the mayor, also forgetting said agreement, announced to the public press that such was the result of the decision, and that unless
64 your orator began immediately to remove all of its tracks on Lexington street it was probable that no such new ordinance could be obtained; all of which your orator maintains was in gross violation of the agreement between your orator and the said mayor and city solicitor, upon the faith of which your orator had confidently relied.

XI. That upon the afternoon of said March 18th, 1893, at an interview between the said city solicitor and Francis K. Carey, one of your orator's solicitors, the said city solicitor was reminded of said agreement, and thereupon the said city solicitor wrote the following letter to the said mayor, to wit:

"LAW DEPARTMENT, CITY HALL,
BALTIMORE, *March 18th*, 1893.

Hon. F. C. Latrobe, mayor, &c.

DEAR SIR: It is proper that I should say to you that the notice of September 21st, 1892, from Captain A. E. Smyrk, city commissioner, to President McLane, of the Lake Roland Elevated Railway Company, was dictated by myself at the request of one of the counsel for the railway company in order to place the company in a position to at once file a bill for an injunction, so that the question of the validity of the ordinance No. 1, of November, 1892, could be speedily decided, both parties being anxious at that time and at all times since then to have the question adjudicated as promptly as possible.

65 Neither party expected Captain Smyrk's order to be obeyed

when it was issued; it was given merely to place the Lake Roland Company in a position to apply for an injunction.

There was an understanding between myself and the counsel for the Lake Roland Company that the company would not proceed further with its work on Lexington street, and that the city would not tear up the tracks already laid pending the litigation, but that until there was a decision by the court of appeals things should stand *in statu quo*.

Yours truly, W. S. BRYAN, JR."

XII. That on the following Monday your orator, being threatened with forcible removal of both its tracks, became convinced that a rival corporation, to wit, the Canton and Point Breeze Railway Company, was about to lay tracks on Lexington street between North street and Calvert street in the event of said forcible removal of both of your orator's tracks, and, being alarmed by the hostile and unfriendly attitude of the public officers of the city, in spite of the fact that it was still unaware of the full effect of said decision, proceeded, with the approval of the city commissioner, to take up one of its tracks, and on the afternoon of the same day, after a conference between the city solicitor, the city counsellor, the president of your orator, and the said Francis K. Carey, the said city solicitor announced that it was his opinion that under said agreement
66 your orator was entitled to at least — track on Lexington street, the running of the time limit having been suspended by said agreement, and thereupon the said city solicitor advised the city commissioner to that effect and instructed him to give your orator the proper location for the said single track, which the city commissioner thereupon proceeded to do *so*, and from that time until the interference complained of your orator has proceeded with all due diligence to reduce its tracks on Lexington street to a single track and to restore the street to its proper condition.

XIII. That this honorable court will find, apart from the rights of your orator under said agreement, that the court of appeals is far from holding that the repealing ordinance of November, 1892, is valid to the extent of prohibiting altogether the tracks of your orator on Lexington street, but, on the contrary, it will be plain to this court, from an examination of the brief of the appellee filed in the court of appeals and the opinion of Judge Bryan, that the said repealing ordinance is distinctly sustained upon the ground that a single track and ample switch room is left to the appellant by the ordinance, and that the ordinance is therefore a reasonable and valid regulation of Lexington street by the mayor and city council, and that it is practically decided by the court of appeals by that opinion that if in fact there had not, in the opinion of the court, been reasonable ground for belief that two tracks on Lexington street were against public safety and convenience it would
67 have held the ordinance to be invalid.

XIV. That your orator is therefore advised and charges that the aforesaid ordinance of November, 1892, at least in so far as it attempts to take away both of your orator's tracks, is an arbitrary,

unreasonable, and illegal attempt to oppress your orator and is void, and that said ordinance, at least so far as it attempts to do more than regulate the use of Lexington street, is in violation of the constitutions of the United States and of the State of Maryland.

XV. That after the said single track and switch had been relocated on Lexington street in the manner set out in the twelfth paragraph of this bill of complaint, to wit, on April 1st, 1893, the mayor of the city wrote to your orator the following letter:

MAYOR'S OFFICE, BALTIMORE, *April 1st*, 1893.

Mr. James L. McLane, president Lake Roland Elevated Railway Company.

DEAR SIR: I am advised by the city solicitor that the Lake Roland Elevated Railroad Company has no authority to lay its tracks on the bed of Lexington street between North and Charles streets in the absence of an ordinance granting such a
68 privilege from the mayor and city council.

I therefore feel it my duty to advise you that, in the opinion of the city law officers, the present single track of your company is occupying the bed of this street in violation of law.

I therefore suggest that an application for such an ordinance be at once made to the city council. There should be made no delay in this matter, as the public convenience requires that Lexington street, especially that portion of it as lies between North and Calvert streets, should be promptly made passable by repaving.

Yours very respectfully,

FERDINAND C. LATROBE, *Mayor*."

To which letter your orator made the following reply:

"BALTIMORE, MD., *April* 3, 1893.

Honorable Ferdinand C. Latrobe, mayor, Baltimore, Md.

DEAR SIR: I beg to acknowledge the receipt of your letter of the 1st inst., suggesting that the Lake Roland Elevated Railway Company at once make application to the city council for an ordinance authorizing its use of Lexington street between North and Charles streets for its present single track.

69 More than two weeks ago and just after the court of appeals had given its decision in the Lexington-street case I had at your request a consultation with City Counsellor Hayes and Solicitor Bryan upon the subject of the company's right to construct this single track, the result of which was that Mr. Bryan went in person to the city commissioner and instructed him to give us the necessary permit to lay the single track in the centre of Lexington street. Work was at once resumed by the company and the track practically finished some days ago, under the direction and to the entire satisfaction of the city commissioner, and but for the fact that the contractor, who was engaged in putting down the asphalt pavement between Calvert and North streets, has been stopped by the city itself, the whole of Lexington street would be promptly made passable.

In view of the fact, therefore, that the single track as now laid on Lexington street is entirely satisfactory to yourself and the city commissioner, and is in strict accordance with the spirit and intention of the repealing ordinance of November, 1892, and the agreement of council, and that the supplementary ordinance is suggested by you rather as a matter of form than of substance, I feel that I am not unreasonable in asking you to withhold further objection to the track until such time at least as the court of appeals takes action on this company's motion for a re-argument of the case and, if necessary, to consent that the question as to whether the company
70 has forfeited its right to this single track shall be submitted to the courts for decision.

Under the circumstances the company is not willing to make an application for the supplementary ordinance suggested by you. You have yourself indicated that such an ordinance would not be passed promptly and as a matter of course merely to confirm the company's right to its single track, but would certainly be the subject of amendment for the purpose of imposing conditions never contemplated by the original ordinance. This condition of things I have no right to invite in a case in which I am advised and believe that this company has a clear right to maintain its single track as now constructed, and that nothing in the recent opinion of the court of appeals justifies the construction sought to be put upon the repealing ordinance of November, 1892, by City Solicitor Bryan.

Very respectfully yours,

J. M. McLANE, *President.*"

XVI. That the mayor has notified your orator that he will proceed forthwith to have all of your orator's tracks torn up on Lexington street and thus deprive your orator altogether of the use of said street and prevent it from reaching its terminus at the corner of Charles and Lexington streets; that if your orator is not moles-ed by the mayor and city council it expects to have its entire rail-
71 way system in successful operation during the coming month of May, when your orator will be able to perform all of its duties as a common carrier of passengers to the full satisfaction and to the great convenience of the general public; whereas if the public authorities are permitted under the extraordinary construction placed upon the ordinance of November, 1892, to destroy your orator's property on Lexington street and prevent it from reaching its terminus by even a single track, your orator will be caused irreparable damage and the public will be caused great inconvenience.

XVII. That acting under the advice of the city solicitor on April 1st, 1892, the city commissioner, who had up to that time co-operated with your orator in the relocating of said tracks on Lexington —, and who had fully approved all of the plans for the said tracks and the crossings, curves, and special work connected therewith, notified your orator to stop all further work in completing said crossings and the connections with its main lines on North street, which order your orator, in a spirit of peace, has obeyed until its right to com-

plete said track could be protected in an orderly way by the issuance of a writ of injunction from this court.

Wherefore your orator prays:

(1.) That the writ of injunction may issue prohibiting and enjoining the mayor and city council of Baltimore, its agents, officers, servants, and employés from tearing up or interfering with
72 your orator's track on Lexington street or from interfering with your orator in the completion of its crossings, curves, special work, etc., necessary to connect up said tracks and prepare them for the operation of your orator's cars.

(2.) That your orator may have such other and further relief as its case may require.

(3.) That the writ of subpœna may issue directed to the said mayor and city council of Baltimore and the said Alfred E. Smyrk, city commissioner, commanding them to be and appear in this court on some certain day to be named therein to answer the premises and abide by and perform such decree or decrees as may be passed therein.

And as in duty bound.

(S'gn'd) LAKE ROLAND ELEVATED RAILWAY COMPANY,
By J. L. McLANE, *President.*

(S'gn'd) STEELE, SEMMES & CAREY,
Solicitors for Plaintiff.

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

I hereby certify that on this fourth day of April, in the year eighteen hundred and ninety-three, before the subscriber, a justice of the peace of the State of Maryland in and for Baltimore city
73 aforesaid, personally appeared James L. McLane, the president of the Lake Roland Elevated Railway Company, and made oath in due form of law that the matters and facts set forth in the foregoing bill of complaint are true and *bona fide* as therein set forth.

——— ———.
(Affidavit made.)

Ordered this fifth day of April, in the year eighteen hundred and ninety-three, by the circuit court of Baltimore city on the foregoing bill of complaint and affidavit, that a writ of injunction be issued as prayed in said bill upon the filing of a bond by the plaintiff in the penalty of two thousand dollars, with security to be approved by the clerk of this court; but liberty is hereby reserved to the defendant to move for the rescinding of this order and for a dissolution of the injunction to be issued as aforesaid at any time after filing their answer to said bill on giving the plaintiff five days' previous notice of such motion; and the clerk is hereby directed to annex a copy of this order to the writ of injunction.

(Signed) HENRY D. HARLAN.

74 *Subpœna.*

THE UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

To the mayor and city council of Baltimore, Greeting:

You are hereby commanded that, all excuses and delays set aside, you be and appear at the clerk's office of the circuit court [SEAL.] of the United States for the fourth circuit, in and for the district of Maryland, on the first Monday in June next, to answer unto the bill of complaint of The Baltimore Trust and Guarantee Company, trustee, a corporation of the State of Maryland, duly incorporated in said court, exhibited against you. Hereof you are not to fail at your peril and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the fifteenth day of April, in the year of our Lord 1893.

Issued 15th day of April, 1893.

JAS. W. CHEW, *Clerk.*

MEMORANDUM.—The defendant is required to enter its appearance in the suit in the clerk's office on or before the first Monday of June next, otherwise the bill may be taken *pro confesso.*

75 *Marshal's Return.*

"Summoned 'the mayor and city council of Baltimore' by service on Henry Seim, acting mayor, and copy subpœna. Bill and order of court left April 17th, 1893, at 10.35 a. m.

WM. F. AIREY,
U. S. Marshal."

76 *Affidavits Filed by Plaintiff.*

Affidavit of Joseph P. Smith. Filed April 20, 1893.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee, }
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE. }

I hereby certify that on this twentieth day of April, in the year eighteen hundred and ninety-three, before me, the subscriber, a commissioner of the United States for the district of Maryland, personally appeared Joseph P. Smith and made oath in due form of law that the memorandum attached hereto, dated December 14, 1892, and headed "To whom it may concern," was signed in good faith by all the parties whose names attached thereto at the time

when the double tracks of the Lake Roland Elevated Railway Company were in position on Lexington street between North street and Charles street.

JOSEPH P. SMITH.
GEORGE MORRIS BOND, [SEAL.]
United States Commissioner for the District of Maryland.

77 BALTIMORE, MD., *Dec.* 14, 1892.

To whom it may concern:

We, the undersigned citizens and taxpayers doing business or owning property on Lexington street, respectfully represent that we have no objection to double tracks being maintained by the Lake Roland Elevated Railway Company on this street from North street to Charles street, and we are satisfied to have the double tracks remain in their present position.

ALEX. YEARLEY & SONS.
JOHN QUINN.
HIRAM WOODS & CO.
JOHN HUBNER.
BERNARD MOORE CARTER.
WM. W. TINGES.
EDMONDS BROS.
C. C. SHRIVER,
President Metropolitan Savings Bank.
JOSEPH M. CONE.
CHAS. C. McCOLGAN.
WM. A. GAULT.
C. C. TURNBULL, JR.
PIERRE C. DUGAN & NEPHEW.
SCHMUCKER & WHITELOCK.

78 *Affidavit of E. C. Eichelberger.*

Filed April 20, 1893.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

I hereby certify that on this 20th day of April, in the year eighteen hundred and ninety-three, before me, the subscriber, a commissioner of the United States for the district of Maryland, personally appeared Edward C. Eichelberger and made oath in due form of law that he is one of the signers of the letter attached hereto, dated April 18th, 1893, and that the other signatures to said letter were made in his presence and are the genuine signatures of the parties signing said letter; that to the best of his knowledge and belief none of the parties signing said letter have any interest in said Lake

Roland Company further than expressed in said letter, and that said letter expresses the real and *bona fide* opinion of the parties signing the same.

EDWARD C. EICHELBERGER.

Subscribed and sworn to before me the day and date last above mentioned.

ISAAC BROOKS, JR.,
United States Commissioner for the District of Maryland.

79 "BALTIMORE, *April 18th*, 1893.

"To the president and board of directors of the Lake Roland Elevated Railway Company.

GENTLEMEN: The undersigned are all engaged in business on Lexington street between North street and Charles street, at the addresses placed opposite to our respective names.

It is our opinion that the operation of a first-class electric railway past our respective offices will be of great advantage to us and to persons doing business with us.

We are satisfied that your company cannot properly and successfully operate its railway system on Lexington street unless it is permitted to lay down and maintain double tracks on Lexington street, from North street to Charles street.

We have had occasion to notice the inevitable blockades and delays which arise when other railways, engaged in laying new tracks, are compelled, pending their construction, to use a single track even for a short distance.

We therefore believe that it will be greatly to our interest, as well as to the interest of persons doing business with us, that your company should not abandon its efforts to maintain its right to lay double tracks on Lexington street between North street and Charles street, and it is our hope that these efforts will result in success.

Name.	Place of business.
John J. Grindall	13 East Lexington street.
M. Sonnehill	13 " " "
Thomas A. Murray	13 " " "
R. H. Carr	9 " " "
Geo. Lycett	9 " " "
E. Allen Lycett	9 " " "
Taylor & Creamer	7 " " "
Central savings bank, John Curlett, pres't	S. E. cor. Lexington and Charles Sts.
W. Stewart Diffenderffer	" " " " " "
C. M. Ellinger	" " " " " "
J. V. Ellinger	" " " " " "
Thos. G. P. Belt & Co	3 East Lexington street.
C. E. Savage	12 " " "
Rufus W. Applegarth	12 " " "
Thomas W. Brundige	12 " " "

Allen McSherry	14	East	Lexiugton	street.
Chas. E. Hill	16	"	"	"
F. W. Feldner	16	"	"	"
P. C. Dugan & Nephew	16	"	"	"
Wm. A. Gault	8	"	"	"
Carroll B. Blick	15	"	"	"
H. D. Loney	18	"	"	"
Rob't E. France	18	"	"	"
Wm. H. Jones	20	"	"	"
Andrew J. Collars	22	"	"	"
Geo. H. Winchester	22	"	"	"
Walker & Martenet	22	"	"	"
F. Henry Boggs	22	"	"	"
Milton W. Audoun	14	"	"	"
W. N. Wamsley	20	"	"	"
Alex. Yearley & Son	24	"	"	"
Sam'l C. Houlton	24	"	"	"
Abraham Sharp	24	"	"	"
Samuel Bealmear	24	"	"	"
Philip Lang	Cor. Lexington and St. Paul streets.			
Watkins & Loose	17	East	Lexington	street.
80 G. Evett Reardon	100	"	"	"
Ruxton M. Ridgely	100	"	"	"
Fielder C. Slingluff	100	"	"	"
Archibald H. Taylor	104	"	"	"
E. P. Keech, Jr.	104	"	"	"
Bernard Wiesenfeld	104	"	"	"
Lorin O. Machin	104	"	"	"
J. S. Pierce	Cor. Lexington and St. Paul streets.			
T. Kell Bradford	Cor. Lexington and Courtland streets.			
Jesse N. Bowen	108	East	Lexington	street.
Chas. F. Stern	108	"	"	"
Peter T. Miller	108	"	"	"
Edw. C. Eichelberger	114	"	"	"

81 *Affidavit of Walter C. Simmons.*

Filed April 20, 1893.

In the Circuit Court of the United States for the District of Maryland.
In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE *BAYOR* AND CITY COUNCIL, of Baltimore.

I hereby certify that on this 20th day of April, in the year eighteen hundred and ninety-three, before me, the subscriber, a commissioner of the United States for the district of Maryland, personally appeared Walter C. Simmons and made oath in due form of law that, he is the assistant engineer of the Lake Roland Elevated railway

that at the request of the Baltimore Trust and Guarantee Company, trustee, he made the measurements which are shown in the schedule attached to this affidavit, marked Schedule A, and that said measurements show with absolute accuracy the distances, widths and other facts set forth in said schedule.

W. C. SIMMONS.

Subscribed and sworn to before me this 20th day of April, A. D. 1893.

ISAAC BROOKS, JR.,
United States Commissioner for the District of Maryland.

82 SCHEDULE A.

With a double track railway laid in the bed of Lexington street so that the center line between the tracks will be identical and coincide with the center line between the curbs. The distance from curb to edge of nearest rail will be as follows:

At east line of Charles street—
" From north curb to nearest rail is ..... 7.5 ft.
" From south " " " " ..... 7.5 ft.

At west line of St. Paul street—
" From north curb to nearest rail is..... 7.21 ft.
" From south " " " " ..... 7.21 ft.

At east line of Calvert street—
" From north curb to nearest rail is..... 7.17 ft.
" From south " " " " ..... 7.17 ft.

The distance between curbs on Charles street at north line of Lexington street is 28.4 ft.

" *Measurement of Vehicles Made at Stewart's Central Stables. All Measurements Are From Out to Out.*

Dist. between.		Character of vehicle.	Owners.
Tires.	Hubs.		
4.0 ft.	4.4 ft.	¾-Buggy	Rodgers.
4.82 "	5.35 "	Surry	Gov. Brown.
4.4 "	4.63 "	Buggy	Rob't Jenkins.
4.78 "	5.26 "	Phaeton	Backhart.
5.35 "	5.8 "	Fancy dayton	De Moyne.
5.33 "	5.87 "	Dayton	McCaffery.
4.58 "	5.26 "	Brougham	B. F. De Ford.
5.1 "	5.6 "	Brougham	M. Jenkins.
5.3 "	5.9 "	Six-seat passenger	R. W. Cator.
4.75 "	5.28 "	Victoria	Mandelbaum.
4.82 "	5.1 "	Victoria	Sewers.
4.8 "	5.1 "	Victoria	Senator Davis.
5.3 "	5.8 "	Dayton	

"The distance between curbs on Lexington street at the east line of Charles street is 29.15 ft.

"The overhang of the widest car to be used by the Lake Roland Company is nine inches."

83 *Affidavit of P. Hanson Hiss and Susan Hiss, His Wife.*

Filed April 20, 1893.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

I hereby certify that on this 17th day of April, in the year eighteen hundred and ninety-three, before the subscriber, a commissioner of the United States for the district of Maryland, personally appeared P. Hanson Hiss and Susan Hiss, his wife, and severally made oath in due form of law as follows:

That they own a certain lot and improvements in the city of Baltimore on the north side of Lexington street between Charles street and St. Paul street, known as No. 6 East Lexington street, fronting twenty-five feet on the north side of Lexington street, occupied on the first floor by the offices of the Greenmount cemetery, and the other floors of which are used for the offices of lawyers and property agents.

That these affiants believe that it is of vital importance to the value of their property and to the comfort and convenience of their tenants and persons doing business with them, that the Lake Roland Elevated Company should be permitted to lay down and maintain double electric railway tracks on Lexington street between North street and Charles street; and that these affiants believe that if the said company is confined to a single track on Lexington street, its operations will be fraught with danger to persons riding upon the said road, and will prevent the said company from properly and successfully performing its duties as a city passenger railway, whereby these affiants will be greatly damaged.

That these affiants have for a long time owned a warehouse on Charles street, occupied by the P. Hanson Hiss Manufacturing Company, between Lexington street and Saratoga street, and that they have found that the construction and operation of the double track electric railway on said street has been of great advantage to their property and business and a great comfort and convenience to their customers.

That these affiants have no interest in the said Lake Roland Elevated Railway Company, direct or remote, further than the interest which they share with the general public in the acquirement of proper rapid-transit facilities.

That these affiants believe that the construction and operation by the Lake Roland Elevated railway of a double track electric railway on Lexington street will greatly increase the value of all real estate on Lexington street, which is occupied almost altogether by

the offices of lawyers and real-estate brokers, whose business is of such a character that the ready access of the public by street railways is of vital importance; that these affiants believe that an attempt to operate said railway with a single track on Lexington street would practically deprive these affiants and all other persons doing business on Lexington street of any real benefit from said railway, because the use of said single track would make it impossible, as these affiants believe, for said railway to be operated to its terminus at Charles and Lexington streets without delays and blockades of a most serious and annoying character;

84

That if the gutters on Lexington street are arranged like the gutters on Charles street, so as to avoid the slope from the curb, there will be room left between the outside rail of said double track on Lexington street and the curb line for buggies, private carriages and all similar vehicles to stand, but that in any event it is a more important requirement that said railway should be successfully and safely operated than that any particular space should be left between the outside rail and the curb line, it having been proved by experience that street cars and vehicles soon accommodate themselves to the joint use of a street under such circumstances, without danger or great inconvenience to either the railway or the vehicles.

P. HANSON HISS. [SEAL.]
SUSAN HISS. [SEAL.]

GEORGE MORRIS BOND,
United States Commissioner for the District of Maryland.

85 *Affidavit of John Curlett, President of the Central Savings Bank of Baltimore.*

Filed April 20, 1893.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE TRUST & GUARANTEE COMPANY, Trustee, Plaintiff,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE, Defendant.

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

I hereby certify that on this 19th day of April, in the year eighteen hundred and ninety-three, before the subscriber, a commissioner of the United States for the district of Maryland, personally appeared John Curlett, president of the Central Savings Bank of Baltimore, and made affirmation in due form of law as follows:

That the Central savings bank, of which I am president, is the owner of certain real estate in Baltimore city, fronting 89 feet on the south side of Lexington street between Charles and St. Paul street-, being the lot northeast cor. of Charles and Lexington streets;

that he is informed that it is necessary for the proper and successful operation of the Lake Roland Elevated Railway Company that it should approach its terminus at the corner of Charles and
86 Lexington streets with double tracks; that in the opinion of this affiant it is more important to him that said railway should be properly and successfully operated than that any particular space should be left between the curb lines of Lexington street and the outside rails of said railway company, and that in view of the fact that double passenger railway tracks are laid upon the streets of the same width as Lexington street without diminishing the value of property binding on said streets, it is the wish of this affiant that the said Lake Roland Company shall be permitted to lay double tracks on Lexington street between Charles street and North street, provided that the gutters on Lexington street are arranged like those on Charles street, so as to avoid the slope from the curb and give all possible space for vehicles to stand between the outside rails of said double tracks and the curb lines.

JOHN CURLETT,
P't Central Savings B'k.

Subscribed and sworn to before me this 19th day of April, 1893.

ISAAC BROOKS, JR.,
United States Commission- in and for the District of Maryland.

87 *Affidavit of Alexander Yearley, Jr.*

Filed April 20, 1893.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee, Plaintiff,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE, Defendant.

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

I hereby certify that on this 19th day of April, in the year eighteen hundred and ninety-three, before the subscriber, a commissioner of the United States for the district of Maryland, personally appeared Alexander Yearley, Jr., and made oath in due form of law as follows:

That he is agent of the owner of certain real estate in Baltimore city, fronting 25 feet on the north side of Lexington street, being No. 114 E. Lexington, between Charles street and Calvert street; that he is informed that it is necessary for the proper and successful operation of the Lake Roland Elevated Railway Company that it should approach its terminus at the corner of Charles and Lexington streets with double tracks; that in the opinion of this affiant

it is more important to him that said railway should be
88 properly and successfully operated than that any particular space should be left between the curb lines of Lexington street and the outside rails of said railway company, and that in view of the fact that double passenger railway tracks are laid upon the streets of the same width as Lexington street without diminishing the value of property binding on said streets it is the wish of this affiant that the said Lake Roland Company shall be permitted to lay double tracks on Lexington street between Charles street and North street, provided that the gutters on Lexington street are arranged like those on Charles street, so as to avoid the slope from the curb and give all possible space for vehicles to stand between the outside rails of said double tracks and the curb lines, and that he is duly authorized after consultation with the owner of the property to make this affidavit.

ALEX. YEARLEY, JR.

Subscribed and sworn to before me the day and date last above mentioned.

ISAAC BROOKS, JR.,
U. S. Commissioner in and for the District of Maryland.

89 *Defendant's Demurrer.*

Filed April 26, 1893.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee, Plaintiff,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE, Defendant.

To the honorable the judge of said court:

The defendant, The Mayor and City Council of Baltimore, files this its general demurrer to so much of the bill of complaint in this cause as avers that a Federal question is involved in this suit between the parties to the same.

THOMAS G. HAYES,
City Counsellor and Solicitor for Defendant.

The undersigned solicitor of this court and for the defendant in the above cause certifies that he advised the filing of the above demurrer and that it is not filed for the purpose of delay.

THOMAS G. HAYES,
Solicitor for Defendant.

90 *Defendant's Answer.*

Filed April 26, 1893.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee, Plaintiff,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE, Defendant.

To the honorable the judge of said court:

The answer of The Mayor and City Council of Baltimore, the defendant in the above-entitled cause, to the bill of complaint against it in this court exhibited, answering, says:

I. That this defendant has no knowledge of the execution of the indenture referred to in the first paragraph of said bill, other than that which appears from "Plaintiff's Exhibit No. 1," and it neither admits nor denies the execution of said indenture, or that said exhibit is a correct copy of the same, or that the certificate attached to the same is in compliance with the act of Congress, in such cases made and provided, but calls for such proof as may, in
91 equity, be necessary to give validity to the use of said copy as an exhibit. As to the averment in said paragraph inserted in brackets, to wit: "(the city terminus of the railway system of the said Lake Roland Elevated Railway Company,)" the defendant avers that this statement is not true as would appear if the plaintiff had, as required by rules of equity, filed ordinance No. 23, approved April 8, 1891, as exhibit to said bill. The fact being, that under said ordinance, the said North Avenue Railway Company has two termini, one at Charles and Lexington streets, and the other at Fayette and North streets, the latter being in the center of the city, and furnishes the said company with the necessary terminal facilities for its traffic.

II. That the defendant has no knowledge of the terms or manner of consolidation of the body corporates referred to in the second paragraph of said bill, that such articles of consolidation should have been filed as an exhibit with said bill. As to the said consolidation of the said body corporates the defendant neither admits nor denies the same, but calls for full proof of the same. The defendant admits that the North Avenue Railway Company is incorporated under the general incorporation laws of the State of Maryland, but the defendant denies that the extract inserted in the bill, is a correct or complete copy of the charter of said company, but is only a part of its certificate of incorporation, and this defendant calls for full proof of incorporation and certificate of incorporation of said North Avenue Railway Company. This defendant admits the incorporation of the Baltimore, Hampden and Lake Roland Railway Company, as averred in said second paragraph of said bill.

III. The defendant avers that the charter of the North Avenue Railway Company in nowise conferred upon said company the right to run its railway in Baltimore city, as averred in the third paragraph of said bill; its charter only empowered said company to use such streets in the city of Baltimore as said city might by re-
92 vocable license grant. The right to use the streets of Baltimore city was not conferred by its charter, but was conferred solely by the defendant by ordinance No. 23, as a license or privilege, revocable at the will and pleasure of the legislative department of the defendant. This defendant has now no knowledge as to the occurrences which preceded the passage of ordinance No. 23, and neither admits nor denies the averments in said third paragraph relating to the same, but calls for full proof of the same, if the plaintiff considers the same material to its case. This defendant submits that even if all the averments in said third paragraph as to the occurrences which preceded the passage of said ordinance, are true; yet, that such facts can in no manner impair the right, or deprive a subsequent city council of Baltimore from repealing said ordinance, if in its legislative discretion it deemed the public welfare justified its repeal, and that such action of said city council is not reviewable by the courts. This defendant avers that the fact that the city council has been derelict in its duty in permitting Charles street, one of the highways of the city, to be obstructed by double tracks, is no reason why the action of the said city council in preventing Lexington street from being likewise taken from the public and given to a private corporation, as would be the case with two tracks on Lexington street, should be held to be unlawful, arbitrary and oppressive. It is true that Charles street, between the limits named in the bill, has had two tracks on it for many years, but the cars on said street are not propelled by electricity, but by horses, and the danger to pedestrians and obstruction to vehicles on said street has not been as great as if a mode of rapid transit had been used. This defendant denies that the cars and tracks on Charles street, as they now exist, are not a great and serious obstruction to said street.

IV. This defendant denies the averments, as conclusions as to the meaning and effect of ordinance No. 23, as given in the fourth
93 paragraph of bill, and leaves to the court to construe the meaning and legal effect of said ordinance, and the defendant herewith files a full and complete copy of said ordinance No. 23, approved April 8th, 1891, marked "Defendant's Exhibit No. 1," and prays the same may be made a part of this answer. The conditions specified in said fourth paragraph, except "*d*" and "*e*," as the conditions on which said ordinance No. 23 was passed were lawful and proper regulations imposed on the North Avenue Railway Company by the defendant for the convenience and benefit of the public, and were in no sense considerations for the grant of the privilege or license. The condition marked "*d*" was imposed because, in the erection of the elevated structure, the poles and wires of telegraph and telephone companies would have to be, in all probability, removed and, in such event, the wires which were attached to said poles were to be placed without charge on the said elevated

structure; it was a provision for the benefit of the said North Avenue Railway Company, because the elevated structure which would interfere with the poles and wires, could not be constructed unless there was some provision for the remeval of said poles and wires. The condition referred to and marked "*e*" was a State tax on all street railway companies, for the benefit of the public parks of the city of Baltimore, as appears from the act of the State of Maryland, of 1882, chapter 229. This defendant has no knowledge of what amount the Lake Roland Elevated Railway Company has expended on the faith of ordinance No. 23, but this defendant avers that whatever amounts said company has expended was with the knowledge of the fact that, under the law, said ordinance was only a license, revocable at the will and pleasure of the defendant, and such expenditure was subject to said provision.

V. This defendant admits that the Lake Roland Company obtained from the legislature of Maryland the act of 1892, chapter 112, as averred in the fifth paragraph of said bill, "ratifying and
94 confirming said ordinance," but the legislature of Maryland, before passing said act, expressly provided, as a part of said act, as follows: "The said mayor and city council to have the same power and control hereafter in reference to the enforcement, amendment or repeal of said ordinance, as it has or would have, in respect to any ordinance passed under its general powers." By this reservation, the power of the defendant over said ordinance, is as full and complete as if said act had not been passed.

VI. The defendant neither admits nor denies the averments in the sixth paragraph of said bill, but calls for full proof of the same. The defendant avers that on the date of the passage of ordinance No. 1, approved 18th of November, 1892, excepting Lexington street, where the tracks had been laid in great haste, by working all night and on election day, a general holiday, the North Avenue Company had not constructed and in operation more than 4,700 feet of the tracks on the route set out in ordinance No. 23. (Defendant's Exhibit No. 2, page 62.) This defendant denies the averment in said sixth paragraph, that, for the successful operation of the Lake Roland Company, it must have its terminus at Lexington and Charles streets.

VII. The defendant denies that the double tracks were laid on East Lexington street before the Lake Roland Company knew it was the intention of the defendant to repeal or amend Ordinance No. 23, and to complete the laying of said double tracks before the passage of ordinance No. 1, the said company worked all night and day and on election day. This defendant denies, as averred in the seventh paragraph of said bill, that the city commissioner gave an unqualified permission to the Lake Roland Company before the passage of ordinance No. 1, approved November 18th, 1892, to lay double tracks on East Lexington street, but as said permit shows, the city commissioner granted the permit because, under the existing ordinance No. 23, and until it was repealed, the said com-
95 pany had the right to lay double tracks on said street. This defendant refers to and adopts as a part of this, its answer,

the record of the court of appeals of Maryland in the case of the Lake Roland Elevated Railway Company against the mayor and city council of Baltimore and Alfred E. Smyrk, a certified copy of which, with decree of court of appeals of Maryland, is herewith filed with this bill, and marked "Defendant's Exhibit No. 2." The answer of this defendant in said record, as it appears on pages 29 to 34, fully sets forth the circumstances under which the Lake Roland Company laid double tracks on East Lexington sereet. On page 27 of said record appears the permit referred to in the bill, which was given to said company by the city commissioner, to lay double tracks on East Lexington street.

VIII. As to the eighth paragraph of this bill, in regard to the single track on Lexington street, this respondent says: That, as that controversy grows out of the construction of an ordinance of the mayor and city council of Baltimore, and of the rights of the Lake Roland Elevated Railway Company, and those claiming under it, and also the effect on its rights under that ordinance, of certain pretended agreements alleged to have been made between counsel in the conduct of the former case, which went to the court of appeals of Maryland, the questions involved are in no sense Federal in their nature, but depend upon principles of municipal law over which, in a controversy like this, between citizens of the same State, this honorable court has no jurisdiction. The whole of said paragraph is irrelevant to the claim here made, but as the allegations have been made, it is right and proper that the facts in the matter should be set fully before the court. The true statement of what occurred will be found in the answer to said bill filed in the circuit court of Baltimore city, together with the restraining order of said court, copies of which will be filed hereafter, and marked respectively "Defendants' Exhibit Nos. 5 and 5½," and are prayed to be taken as a part hereof, and also in the affidavits
96 herewith filed of the mayor and city solicitor of Baltimore, marked respectively "Defendant's Exhibits Nos. 6 and 7." The said circuit court of Baltimore city has overruled a demurrer to said bill filed on behalf of the city of Baltimore, and has stated in its opinion that, by the proper construction of the said ordinance No. 1, of November 18th, 1892, the Lake Roland Elevated Railway Company has a right to a single track, and there is now a preliminary injunction against the mayor and city council of Baltimore, restraining it from interfering with said single track. If this ruling is not hereafter modified or reversed by the said circuit court of Baltimore city, or by the court of appeals, it will be binding upon the city authorities. There is therefore, and can be, no such danger of any immediate removal of the said single tracks as would justify an application for an injunction. The said decision being in favor of the Lake Roland Company enures to the benefit of plaintiff, and for this additional reason, no Federal question is involved in the matter of a single track under ordinance — 1892.

The claim to a single track, under the provisions of said ordinance No. 1, of November 18th, 1892, is moreover utterly incon-

sistent with the pretensions in this bill that said ordinance is unconstitutional and utterly void.

IX. This defendant denies, as averred in the ninth paragraph of said bill, that ordinance No. 23, approved April 8, 1891, constituted a perpetual and inviolable contract between the municipal corporation and the North Avenue Company, the terms of which cannot be altered or impaired without the consent of both parties to the contract; and denies that, therefore, the subsequent ordinance purporting to change the terms of the original ordinance so as to deprive the North Avenue Company of the right to approach its terminus with double tracks, is in contravention of the tenth section of the first article of the Constitution of the United
97 States, which forbids legislation which impairs the obligation of contracts, and for that reason the subsequent ordinance is void.

This defendant avers that, in no sense, was ordinance No. 23 a contract between the defendant and the North Avenue Company, but was only a license granted to the North Avenue Company to use the specified streets of the defendant, subject to revocation at the will and pleasure of the legislative department of the defendant. That if the defendant were to make such a contract as is set forth in the ninth paragraph of said bill, or any other irrepealable contract of the kind, it would be *ultra vires* and null and void.

The defendant is a municipal corporation with only delegated powers. Its control of the streets under the power so delegated is in trust for the benefit of the general public, and it has no power by an irrepealable or irrevocable grant to divert the public highways from their primary use for the benefit of the general public on foot, horseback, and in vehicles, by a perpetual grant to any street railway to use and occupy such highways with its tracks and cars. Ordinance No. 23 was passed by the city council of the defendant, under its public and legislative powers over the streets of Baltimore city, which are held in trust for the general public by the defendant, and the privilege or license conferred by said ordinance could only continue so long as the legislative department of the defendant considered it proper for the public welfare to permit the privilege or license so to continue. The defendant, under its charter, has no power to make to any street railway company an irrepealable grant of the use of its streets with tracks and cars. Ordinance No. 23 in the case of the Lake Roland Elevated Railway Company against the mayor and city council of Baltimore, the record of which case has been heretofore filed and marked "Defendant's Exhibit No. 2," has just had a judicial interpretation by the court of appeals of Maryland, and in
98 which case that court clearly and expressly decided that ordinance No. 23 was not a contract, but only a revocable license. That case sought, for the reasons averred in the ninth paragraph of this bill, to have said ordinance of 1892 declared void, which the court of appeals refused to do. The original opinion of the court was written by Judge Bryan, a copy of which is hereunto filed and marked "Defendant's Exhibit No. 3," and prayed to be taken as a

part of this answer. After the delivery of said opinion the solicitors of the plaintiff in this cause, who were also of counsel for the Lake Roland Company in the case in court of appeals of Maryland, filed a lengthy printed motion for re-argument of said case, and the court of appeals unanimously overruled said motion. Chief Judge Alvey, for himself, filed a concurring opinion reaffirming the decree below, and agreeing in all material respects in both the reasons and conclusions of the original opinion, a certified copy of which opinion is herewith filed, marked " Defendant's Exhibit No. 4," and prayed to be made a part of this answer. The following extract from the opinion of Judge Bryan emphatically decides that ordinance No. 23 is not a contract; his language is as follows: " We hold that ordinance No. 23 did not vest in the Lake Roland company an irrevocable right in the streets." The following extracts from the opinion of Chief Judge Alvey asserts the same doctrine. Judge Alvey says: " The power to maintain and regulate the use of the streets of the city is a trust for the benefit of the general public. * * * The mayor and city council cannot divest themselves of this trust. * * * The power vested in them in respect to the streets is of legislative character; and they can neither restrict themselves nor their successors by any irrepealable ordinance in the exercise of such power over the streets, except it be by the express authority of the legislature of the State."

X. The defendant denies, as averred in the tenth paragragh
99 of said bill, that the terminus at Lexington and Charles streets is absolutely essential to the successful and proper operation of the said railway, and without it the Lake Roland Company cannot maintain a sufficient schedule of cars for the carriage of its passengers and the convenient and successful performance of its duties as a common carrier of passengers for hire, and that by the repeal of said rights, it would be deprived of a substantial and highly valuable part of its franchise. This defendant refers to and adopts, the same as if specifically averred, the testimony and facts set out in " Defendant's Exhibit No. 2," as a complete refutation of said averment.

This defendant denies the further averment in said ninth paragraph which avers that the deprivation of the said company of its terminus at Lexington and Charles streets would seriously diminish and impair the value of its property, and in that way deprive the plaintiff and the holders of the mortgage bonds issued under its mortgage aforesaid, of a substantial, essential and valuable part of their security, and seriously lessen the value of said bonds, and the opportunity of the said Lake Roland Company to promptly meet the principal and interest of the said bonds as they fall due, or in the event of a sale under said mortgage, would seriously lessen the value of said property and franchises in the eyes of a purchaser. This defendant avers that said last-recited averment taken from the bill, in addition to being not true, in fact, is wholly insufficient in law to give this court jurisdiction in this suit, as the bill does not aver, either by said averment or elsewhere, that a right, immunity or privilege of the plaintiff arising under the Constitution or laws

of the United States, is denied or impaired by a law of the State of Maryland, passed after the issue of said bonds. Said averment at best only avers that the value of the mortgage contract and bonds issued thereunder, would be affected, and that the income from the Lake Roland Company, which is dedicated to pay said bonds and interest would be lessened, neither of these results necessarily
100 impair the obligations of a contract, and is not a violation of the tenth section of the first article of the Constitution of the United States. The defendant avers that the plaintiff is bound by the adjudication in the case set out in "Defendant's Exhibit No. 2," and has no standing in the court in its capacity as trustee, or otherwise.

This defendant, further answering, says that it is credibly informed, and therefore charges that it is not true, as averred in the said tenth paragraph of said bill, that all the one thousand bonds as aforesaid, aggregating the sum of one million dollars ($1,000,000), have been in good faith issued by the said Lake Roland Company to *bona fide* purchasers for value, prior to the passage of said ordinance of November, 1892, in whose hands said bonds now remain, and that this bill is filed in the interest, for the protection, and at the request of all of said bondholders, all of whom reside out of the State of Maryland, for the purpose of protecting them from irreparable injury.

This defendant avers that at the institution of the suit, the record of which appears in "Defendant's Exhibit No. 2," the Lake Roland Company repeatedly assured this defendant that its only object in seeking a speedy determination of the questions involved in said suit, was to enable said company more advantageously to float said bonds, said company then stating that none of said bonds had been then placed on the market. On page 76 of said "Defendant's Exhibit No. 2," the testimony of James L. McLane, the president of the said Lake Roland Company, expressly denies that the whole of said bonds have been issued; his testimony is as follows:

"5 Re-X Q. That is, a mortgage has been executed for a million of dollars, and the trustee will issue bonds under that mortgage up to that amount?"

"A. Yes, sir."

"6 Re-X Q. But a million dollars' worth of bonds has not actually been sold under the mortgage up to date?"

101 "A. Not that I know of." (Defendant's Exhibit No. 2, page 76.)

This defendant, on information, therefore charges that the sale of said bonds was not made prior to said ordinance No. 1, approved April 18, 1892, and act 1890, chapter 370 of the Laws of Maryland, but that the same, if sold at all, were sold since said ordinance and act were passed, and that the sale was colorable in order to obtain the jurisdiction of this honorable court over a question of law which was fully and finally settled by the court of appeals of Maryland.

This defendant calls upon the plaintiff to state by affidavit, or otherwise, on the oath of its president, the following facts:

1. The date of sale of any of said bonds and to whom sold, giving names and residence of purchasers.
2. What consideration was paid for said bonds, and how and when was it so paid?
3. When were said bonds delivered by the plaintiff, or Lake Roland Company, to said purchasers?
4. What broker or agent, if any, sold said bonds?
5. Had any of the purchasers of said bonds any business connection at any time with the Lake Roland Company, and had any of said purchasers advanced or promised to advance moneys to said company before the delivery to them of any of said bonds?

XI. This defendant avers that the whole of the averments of the eleventh paragraph of said bill are immaterial, because if they were true they could in nowise affect the validity of ordinance No. 1, approved November 18th, 1892, as the propriety of the passage of said ordinance was solely a matter to be decided by the legislative
102 department of the defendant, and is not a judicial question over which the courts can exercise any control. This defendant answering, however, so much of the averments as it deems proper, says that it is untrue that said ordinance No. 1 was a wanton, arbitrary and illegal attempt to oppress the said Lake Roland Company, and in refutation of said averment this defendant refers to "Defendant's Exhibit No. 2," and prays that the same in its entirety may be taken as a part of this answer, the same as if specially here repeated. This defendant denies that railway tracks on the public streets are a convenience to the public, but avers that they are a great obstruction and inconvenience; both injurious to vehicles and an interference with the entire driveway of the street. That the cars of the Lake Roland Company can be propelled at the rate of ten miles an hour by the terms of ordinance No. 23, that this speed in addition to the increased obstruction resulting from cars run at short intervals, at such a speed, on a public highway like Lexington street, between Charles and North streets, would be dangerous to life and property, as well as an obstruction.

This defendant submits again, as hereinbefore stated, that the fact that there should be only one track on Charles street instead of two, is no reason why two tracks should be permitted on East Lexington street; the two tracks now on Charles street are a most material obstruction to the travel on said street, although the part of Charles street in question is relieved by parallel streets on which are no car tracks, which is not the case with Lexington street. The defendant calls for full proof of each and every averment in said eleventh paragraph of said bill.

XII. The defendant denies each and every averment of said bill, except such as are hereinbefore admitted, and calls for full proof of the same.

103 XIII. The defendant having fully answered said bill, prays to be hence dismissed with its costs.

As in duty, &c.

[Seal of City of Baltimore.]

FERDINAND C. LATROBE,
Mayor of Baltimore City.

THOMAS G. HAYES,
City Counselor and Solicitor for Defendant.

UNITED STATES OF AMERICA, *District of Maryland,* } *ss:*

I certify that on this the 26th day of April, 1893, before me, clerk of the circuit court of the United States for the district of Maryland, personally appeared Ferdinand C. Latrobe, mayor of Baltimore city, and made oath in due form of law, that the matters and things stated in the aforegoing answer are true.

JAS. W. CHEW, *Clerk.*

104 "DEFENDANT'S EXHIBIT No. 1."

Filed April 26, 1893, with defendant's answer.

Ordinance No. 23. *Approved April* 8, 1891.

An ordinance to authorize the construction of city passenger railway tracks by the North Avenue Railway Company of Baltimore City, on North avenue, from McCulloh street to Guilford avenue, and thence on Guilford avenue and North street to Lexington street, and thence on Lexington street to Charles street, and on North street to the north side of Fayette street.

SECTION 1. Be it enacted and ordained by the mayor and city council of Baltimore, That the North Avenue Railway Company of Baltimore City, be and it is hereby authorized to lay down
105 and construct double iron railway tracks for the purposes of its business, and in connection with double tracks now authorized to be constructed by it on North avenue to McCulloh street, beginning for said extension on North avenue, at its intersection with the east side of McCulloh street, the present terminus of the tracks of the said company as heretofore authorized, and running thence on North avenue eastwardly to Guilford avenue, and running thence on Guilford avenue and North street southwardly to the intersection of North street with Lexington street, and thence on Lexington street westwardly to Charles street, and on North street southwardly to the north side of Fayette street.

SECTION 2. And be it further enacted and ordained, That the said tracks shall be of the standard gauge maintained by other passenger railways in the city of Baltimore, and it shall be lawful for the mayor and city council at any time hereafter, by ordinance, to authorize any other railroad now incorporated, or hereafter to be incorporated, to use the tracks hereby authorized to be laid, or any

part thereof, upon terms to be agreed upon between the North Avenue Railway Company of Baltimore City and the company asking the privilege of using said tracks; provided, however, if the said two companies cannot agree upon the terms upon which said tracks are to be used, the matter shall be referred to the arbitration of the mayor, city commissioner and president of the said The North Avenue Railway Company of Baltimore City, for the time being, and the terms fixed by a majority of said board of arbitration shall be binding upon the said North Avenue Railway Company of Baltimore City and the company asking said privilege; provided, further, that no use shall be made of said tracks by any other road which will interfere with the general schedule adopted by the said North Avenue Railway Company of Baltimore City for the running of its cars.

SEC. 3. And be it further enacted and ordained, That it
106 shall be lawful for the said North Avenue Railway Company of Baltimore City to use the tracks now laid on North Avenue by the Baltimore City Passenger Railway Company, the Baltimore Union Passenger Railway Company, the North Baltimore Passenger Railway Company, or the Baltimore, Peabody Heights and Waverly Railroad Company, and the Baltimore and Yorktown Turnpike road, in the manner and to the extent to which it is lawful for the mayor and city council of Baltimore to grant to the said North Avenue Railway Company of Baltimore City the right to use said tracks, and in any case in which the said railroads are entitled to the exclusive use of said tracks; and the said North Avenue Railway Company of Baltimore City cannot agree with them for the joint use of their said tracks, then it shall be lawful for the said North Avenue Railway Company of Baltimore City to lay its rails inside and outside of said tracks of other roads, provided that if inside and outside rails are laid, the distance between its rails and the corresponding rails of other railroads shall not be less than six inches, nor more than two feet. The right to run the cars of the North Avenue Railway Company of Baltimore City, on the tracks of the Baltimore, Peabody Heights and Waverly Railway Company, or the North Baltimore Passenger Railway Company, on North avenue, from Charles street to McMechin street, is hereby granted under the terms of ordinance No. 74, approved June 7th, 1872, but nothing herein contained shall be construed to grant any right or privilege to the said North Avenue Railway Company of Baltimore City to lay any additional tracks on North-avenue bridge.

SEC. 4. And be it further enacted and ordained, That ordinance No. 173, approved November 11th, 1889, and ordinance No. 159, approved July 30th, 1890, of the mayor and city council of Baltimore, be and the same are hereby repealed and revoked, so far as they authorize and empower the said North Avenue Railway Company
of Baltimore City to propel its cars by electricity, cable or
107 other improved motive power, but that from and after the passage of this ordinance, it shall be lawful for said North Avenue Railway Company of Baltimore City to propel its cars by electricity supplied from overhead wires, upon and over any part of

its railway now constructed, or hereafter to be constructed, and to erect and maintain the necessary poles and wires for this purpose, upon complying with the terms and conditions following, that is to say:

(1.) That it shall be the duty of the said North Avenue Railway Company to protect its overhead wires from contact with electric light or rather wires, by proper guard wires, and to provide on said railroad every proper safeguard and improvement for public protection and convenience, which are in general use in other cities using the overhead electric system, or which may, from time to time, be deemed necessary by the mayor and city commissioner.

(2.) That it shall be the duty of the said North Avenue Railroad Company in making the extension hereby authorized, to use iron poles of neat and ornamented design, and whenever the width of the street permits of it, and it is in other respects feasible, said poles shall be placed between its two tracks, with arms on either side carrying the wires over each track; and provided further, that the mayor and city commissioner shall determine at what points upon the line of said company said poles shall be placed between the two tracks of said company.

(3.) That the said North Avenue Railway Company shall not charge more than one fare of five cents for any continuous single trip over any of its lines, and shall transfer its passengers free from any line operated by it to any other line operated by it, and that it shall carry over its line free of charge, passengers who present transfer tickets from any other city passenger railway company which it crosses or connects with, which shall accept transfer tickets from the passengers of the North Avenue Railway Company of
108 Baltimore City upon the same terms; provided, however, that the said North Avenue Railway Company of Baltimore City shall not be obliged to accept such transfer tickets except from persons taking its cars at the place of such crossing or connection, and such transfer ticket shall be good only on the day of their issue, and for transportation upon the cars of the said North Avenue Railway Company of Baltimore City passing said crossing or connection next after the arrival at said point of the cars of such other railroad from which the passenger presenting such transfer ticket shall have alighted.

(4.) That said North Avenue Railway Company shall at all times keep the spaces between its tracks and two feet on each side thereof in good repair, under the supervision of the city commissioner, and whenever any portion of any street upon which its tracks shall be laid under the provisions of this ordinance shall be repaved, then the said railway company shall be required to pay the entire expense of repaving such spaces with such pavement as the mayor and city council shall prescribe; provided, however, that whenever any portions of North avenue so to be paved, repaved or repaired, are occupied by the tracks of any other city passenger railway or railways, said North Avenue Railway Company shall only be required to contribute its proportionate share of the expenses of such paving, repaving or repairing; and provided further, that under no

circumstances shall the North Avenue Railway Company be required to pay more than one-fourth of the total cost of repaving the portion or portions of such street or streets upon which its tracks shall be so laid.

(5.) That it shall be lawful for the mayor and city council at any time hereafter to cause to be removed at the expense of the company, any or all of the poles and overhead wires hereby authorized to be erected, after one year's notice to the said North Avenue Railway Company of Baltimore City, and it is hereby declared to
109 be the distinct purpose and intention of this ordinance to give the sanction of the mayor and city council to the use of the overhead electric system by the said North Avenue Railway Company of Baltimore City, as a motive power and means of traction only upon its compliance with the terms and conditions herein set forth, and that the use of the said overhead electric system by the said North Avenue Railway Company of Baltimore City shall be deemed an acceptance by it of all said terms and conditions. And it is further distinctly declared that nothing in this ordinance shall be in any manner construed so as to give to any other city passenger railway company the right to use the overhead electric system without the express consent of the mayor and city council.

SEC. 5. And be it further enacted and ordained, That it shall be lawful for the said North Avenue Railway Company of Baltimore City to bridge the tracks of the Northern Central Railway Company, from the corner of Eager and North streets to the corner of Saratoga and North streets, and to make the proper and necessary elevated structure for the purpose of effecting said crossing and the approaches thereto; provided, however, that in no case shall the said elevated crossing, or any part thereof, extend south of the present entrance to the Central police station building, or north of the corner of Guilford avenue and Chase street; and provided further, that if in ascending and descending said elevated crossing any part of the street shall be used, the ascent and descend shall be made in such a manner as to leave at least ten feet clear for the passage of vehicles between the curb line and the outside edges of the ascending and descending structure; and provided further, that all electric light, telephone, telegraph or other wires on North street, between Saratoga and Eager streets, belonging to the companies now operating such wires, may be strung by said North Avenue Railway Company upon fixtures adapted to their existing uses upon
110 said elevated structure, at the cost of the said North Avenue Railway Company of Baltimore City, which shall maintain the said respective fixtures, and the poles now supporting the said wires between said streets may be thereupon removed by the said company, it being intended by this provision, in the case of said removal, to substitute the said elevated crossing for the poles now erected on North street, between the above points, in such a manner that the companies owning the said poles may have the same free use of said structure for their said wires, without cost or inconvenience, as they now have, of their said poles, and all wires or cables, to be added to, or substituted for said wires, by the said respective elec-

tric light, telephone and telegraph companies owning the same, may hereafter be strung and maintained upon said elevated structure in positions suitable to their proper uses, without charge or hindrance by said North Avenue Railway Company; but the expense of stringing said wires or cable, so to be added, shall be borne by the respective companies so stringing the same upon said elevated structure.

SEC. 6. And be it further enacted and ordained, That the said elevated crossing shall be so constructed that there shall be not less than ten feet clear width between the structure and the building line on North street, and not less than six feet of clear width between the said building line and the railed platforms and stairways at the stations (provided, however, that these requirements may be changed with the consent of the owners of abutting property), and there shall be not less than seven feet clear width between the columns of the structure and the centre line of any steam railway track, and not less than twenty feet clear headroom under the structure over such steam railroad track, to conform to the bridge specifications of the Pennsylvania Railroad Company, and the structure shall be so built as to present no obstacle to the construction hereafter of elevated viaducts over the steam rail-
111 road tracks on Centre and other cross-town streets; and provided, that the columns of the structure which support the long spans and girders adjoining Centre and Madison streets, shall not be more than twenty inches square; that all other columns supporting the structure shall be not more than fifteen inches square, and the said stations with proper stairways, securely railed, shall be placed at the intersection of North street with Madison, Centre, Franklin and Pleasant streets; and provided further, that the said elevated crossing shall be constructed in accordance with the plan herewith submitted to be filed with the city commissioner, and which plan is hereby made a part of this ordinance; provided, however, that the said plan may be varied with the consent of the mayor and city commissioner.

SEC. 7. And be it further enacted and ordained, That the said North Avenue Railway Company of Baltimore City shall be liable to the payment of the park tax, and be subject to all the other general regulations now existing, or hereafter to be made, relating to city passenger railways, not inconsistent with this ordinance, and shall in all other matters be subject to the provisions and possess the powers heretofore made and granted by the mayor and city council of Baltimore in respect to said North Avenue Railway Company of Baltimore City; provided, however, that nothing in this ordinance shall be construed to allow steam motive power to be used on said railway or any part thereof; and provided further, that the cars of the said company shall not travel upon the streets of the city upon any part of its tracks lying to the east of Pennsylvania avenue at a greater rate of speed that ten miles an hour, exclusive of stoppages, except while on the elevated crossing on North street, when the speed may be increased to fifteen miles an hour, and that on any part of its tracks lying to the west of Pennsylvania avenue its

speed shall not exceed fifteen miles an hour; and provided further, that no car shall be run on said railway without
112 one conductor and one motorman; and provided further, that whenever it shall be necessary for the said company to cross any street gutters with its rails, it shall provide iron gutter plates at its own expense, similar to those in use, or to be used by the city; for all gutters that cross intersecting streets parallel to the line of track, and all gutters that cross its track in a transversal direction, said iron gutter plates to be provided and put in place to the extent of at least ten feet beyond the corners of such intersecting streets, said plates to be laid to the extent and in the manner required by the city commissioner, and to renew the same from time to time, as in his judgment may be necessary.

SEC. 8. And be it further enacted and ordained, That if at any time hereafter all the tracks of the Northern Central Railway Company shall be removed from the surface of North street, between Eager street and Saratoga street, the right is reserved to the mayor and city council to require the said North Avenue Railway Company of Baltimore City to remove the elevated crossing hereby authorized to be constructed, after one year's notice of its intention to require said removal; provided, however, that the right of removal shall not be exercised until the said mayor and city council shall first have made provision for the occupation of the surface of North street, between Eager and Saratoga streets, by the tracks and wires of the said company, and shall also have provided by ordinance, (but without expense to the city) for the electric light, telegraph, telephone and other wires strung on said elevated structure; and provided further, that if the said elevated structure or its intended uses shall interfere with the crossing over such structure, and with the independent uses of the several existing telegraph, telephone or electric light wires now in operation on North street, between the limits aforesaid at such crossing, the expense of carrying said respective wires over and across said structure at the necessary
113 higher elevation shall be repaid by the said North Avenue Railway Company of Baltimore City to the respective companies incurring such expense.

SEC. 9. And be it further enacted and ordained, That the said tracks, wires and poles hereby authorized, including the said elevated crossing, shall be laid and constructed under the supervision and direction of the city commissioner, or such other person as the mayor and city council shall select; provided further, that if any final judgment shall be recovered against the said North Avenue Railway Company of Baltimore City for damages done to property by reason of the construction or use of said elevated crossing, then in addition to the ordinary remedies at law, the owner of such judgment shall have the further right to enjoin the operation of said railway unless the same is paid within sixty days after the final decision of the action in which said judgment is rendered; and said company, by accepting this ordinance or acting under the same, expressly agrees that the owner of said judgment shall be so entitled to such injunction and assents to the issuing of the same until

such judgment is paid; and if any final judgment recovered against the said company as aforesaid, shall not be paid within such period of sixty days, then from and after the expiration of such period, all the rights of said company, its successors and assigns, under this ordinance shall cease and be in abeyance until the judgment shall be paid, and the right to continue the construction or operation of the road shall only be revived after the payment thereof; and said North Avenue Railway Company of Baltimore City, by the acceptance of the privileges hereby conferred, expressly agrees that it shall be responsible for injuries judicially ascertained to be done to private property or to persons by the construction or use of said elevated crossing.

SEC. 10. Be it further enacted and ordained, That the said
114 North Avenue Railroad Company shall employ none other than *bona fide* residents of Baltimore city, as mechanics and laborers on its lines.

SEC. 11. Be it further enacted and ordained, That the mayor and city council of Baltimore shall have the privilege within two years after the expiration of fifteen years from the passage of this ordinance, to purchase and buy out the stock and interest of said North Avenue Railway Company of Baltimore City, together with such appurtenances to said company as the said mayor and city council may deem proper, for and at a fair and equitable valuation, and in case of a disagreement as to said valuation, the mayor and city council aforesaid shall appoint one referee, the said North Avenue Railway Company of Baltimore City, or its assigns, shall appoint another referee, who, in the event of a disagreement, shall appoint an umpire, the decision of whom shall be final as to the price to be paid as aforesaid; and provided further, that if said mayor and city council shall decline or neglect to give notice to said company of their intention to make said purchase within the aforesaid two years, then the grants and privileges herein given to said company shall continue to them or to their assigns for fifteen years longer, subject to all the conditions and terms contained in this ordinance, and renewable thereafter every fifteen years under the aforesaid terms and conditions.

SEC. 12. And be it further enacted and ordained, That this ordinance shall take effect from the date of its passage.

Approved April 8th, 1891.

ROBERT C. DAVIDSON, *Mayor.*

115 "DEFENDANT'S EXHIBIT NO. 2."

Filed April 26, 1893, with defendant's answer.

Record.

In the Court of Appeals of Maryland.

LAKE ROLAND ELEVATED RAILWAY COMPANY
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE and ALFRED E. SMYRK, City Commissioner. } No. —.

Appeal from the circuit court of Baltimore city.

Filed January 5th, 1893.

Bernard Carter, Wm. A. Fisher, —— Steele, —— Semmes, —— Carey, for appellants; William S. Bryan, Jr., Thomas G. Hayes, for appellees.

116 In the Circuit Court of Baltimore City.

Bill of Complaint and for Injunction.

(Filed 30th November, 1892.)

In the Circuit Court of Baltimore City.

LAKE ROLAND ELEVATED RAILWAY COMPANY, Plaintiff,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE and ALFRED E. SMYRK, City Commissioner of Baltimore City, Defendants.

To the honorable the judges of said court:

Your orator complaining says:

I. That your orator is a corporation of the State of Maryland, duly incorporated, as authorized by law, under the laws of said State, under an agreement of consolidation between the North Avenue Railroad Company of Baltimore City, and the Baltimore, Hampden and Lake Roland Railroad Company; both of said constituent corporations, being also corporations of the State of Maryland, duly incorporated under the laws of said State, the said North Avenue Railway Company of Baltimore City, having been formed and organized under the general incorporation laws of said State; and the said Baltimore, Hampden and Lake Roland Company having been originally incorporated by the General Assembly of Maryland, by chapter 285 of the acts of 1872, which act was *received* and amended by the said General Assembly by chapter 232 of the acts of 1892; and your orator files herewith as part of this bill of complaint a duly certified copy of the certificate of incorporation of the said North Avenue Railway Company of Baltimore City, and a duly

certified copy of the said agreement of consolidation, marked respectively Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2.

II. That by a series of ordinances of the mayor and city council of Baltimore, the said North Avenue Railway Company of Baltimore City was duly authorized to build and maintain an electric railway in the city of Baltimore, and that part of its authorized route extends from the corner of North avenue and tenth street, along North avenue eastwardly to McCulloh street; and that by ordinance No. 23, of the mayor and city council of Baltimore, approved April 8th, 1891, your orator was duly authorized to extend its double tracks from its then terminus to the corner of
117 North avenue and McCulloh street, eastwardly along North avenue to Guilford avenue; thence southwardly along Guilford avenue and North street to Lexington street; and thence westwardly along Lexington street to Charles street, and southwardly on North street to the north side of Fayette street; and your orator files herewith, as part hereof, a copy of said ordinance No. 23, marked "Plaintiff's Exhibit No. 3."

III. That by the terms of the said ordinance No. 23, in consideration of the grant of the privilege therein contained, including the grant of the right to lay said double tracks on Lexington street between North street and Charles street, the said mayor and city council imposed upon your orator a number of harsh and unusual duties, which, up to that time, were unknown to the history of railway legislation in the city of Baltimore; requiring it to exchange free transfers with all railways which it would cross or connect with; providing that it should be required to pay a large proportion of the cost of any new pavement laid on any street to be occupied by its tracks; reserving the right to authorize other railways to use its tracks; and in many other ways imposing upon it costly and onerous conditions; and that, as a further consideration of said grant, your orator is required to pay, and has regularly paid, the usual tax of nine per cent. upon its entire gross receipts, commonly known as the "Park tax," for the privilege of operating its railroad on the streets of Baltimore city.

IV. That as an illustration of the hardship and the breach of faith which would be involved in any attempt to take away one of your orator's tracks, on Lexington street, your orator shows that Lexington street, between North and Calvert streets, is about to be paved with sheet asphalt, and it being provided in said ordinance, No. 23, that "whenever any portion of any street, upon which the tracks should be laid, under the provisions of this ordinance, shall be repaved, then the said railway company shall be required to pay the entire expense of repaving the spaces between its tracks, and two feet on each side thereof, with any improved pavement selected by the city commissioner. The city commissioner, of Baltimore city, has notified your orator that it will be required to pay its legal part of said pavement, which in this case will amount to more than one-half the cost of the entire square, and be a heavy charge on your orator. Wherefore your orator shows that for this, and other similar reasons, the said ordinance, No. 23, clearly constitutes a contract

between the mayor and city council of Baltimore, and that your orator has been, and is being required, to make a substantial return to the said mayor and city council of Baltimore for the use of its streets.

V. That by chapter 217, of the acts of 1890, the General Assembly of Maryland, authorized and empowered your orator to consolidate with certain other roads, or to buy or lease the same, and that by chapter 112 of the acts of 1892, the aforesaid ordinance No. 23, was duly ratified and confirmed, the said ratification to have the same effect as though at the time of the passage of the said ordinance. The said mayor and city council had had full power to pass the same, and to grant each and all of the powers in said ordi-
118 nance granted the said mayor and city council to have the same power and control hereafter in reference to the enforcement or repeal of said ordinance as it has, or would have, in respect to any ordinance passed under the general power. The main purpose of the passage of the said act of 1892, chapter 112, as will appear from the preamble thereto, being to authorize the building of the elevated portion of said extension on North street, which the court of appeals of Maryland had decided to be an elevated railway within the prohibition of article 23, sec. 186, of the code of 1888, and which could, therefore, only be erected with the sanction of the General Assembly.

VI. That shortly after the passage and approval of the said ordinance No. 23, and in pursuance of the authority therein conferred, the said North Avenue Railway Company of Baltimore City proceeded to extend its double tracks from the corner of North avenue and McCulloh street eastwardly, along North avenue to McMechen street, and eastwardly from Charles street to Guilford avenue (with the design of using the tracks of the North Baltimore Railway Company, now owned by the Baltimore Traction Company, from McMechen street to Charles street); and laid down an extensive *paid* of double tracks between the points named, outside of the double tracks of the Baltimore Union Passenger Railway Company, now the City and Suburban Railway Company, and erected iron poles and strung wires for its overhead electric system; and although the right of the said North Avenue Company to lay said outside double tracks was challenged by certain plaintiffs in this honorable court, it was held by this court that said tracks were lawfully laid, and the decree of this court was duly confirmed by a decree of the court of appeals.

VII. That shortly after the construction of said double tracks on North avenue by ordinance No. 47 of the mayor and city council of Baltimore, approved April 8th, 1892, the said Union Passenger Railway Company was authorized to equip its several railway lines in Baltimore city with the overhead electric system, and in said ordinance it was in effect provided, that unless the North Avenue Railway Company of Baltimore City should take up its outside double tracks on North avenue and use the tracks laid on said avenue by the said Union Company upon terms fixed by the mayor and city commissioner, it should become the duty of the mayor to notify the

said North Avenue Company to remove its electric poles within one year from the date of said notice in conformity with the right reserved in said ordinance No. 23 by section 4, and the said Union Company and the said North Avenue Company having mutually agreed to accept the terms fixed by the mayor and city commissioner under said ordinance for the joint use by the said companies of the tracks laid by the Union Company, an agreement was entered into between the said two companies to that end, and your orator files herewith as part hereof a copy of said ordinance No. 47, and a certified copy of said agreement marked respectively Plaintiff's Exhibit No. 4 and Plaintiff's Exhibit No. 5.

VIII. That after the passage of said ordinance No. 47, and before the execution of said agreement by ordinance No. 46, of the mayor and city council of Baltimore, approved April 8th,
119 1892, the said ordinance No. 23 was amended by extending the length of notice for the removal of the poles of the said North Avenue Company and limiting the distance for which its tracks could be used by other companies under ordinances of the mayor and city council, which ordinance was made to take effect upon the execution of the agreement referred to in the next proceeding paragraph of this bill, and your orator files herewith as part hereof a copy of said ordinance No. 46, marked Plaintiff's Exhibit No. 6.

IX. That after the execution and record of the above-mentioned agreement of consolidation whereby your orator succeeded to all the corporate rights and franchises of the said North Avenue Railway Company of Baltimore City and the said Baltimore, Hampden and Lake Roland Railroad Company, your orator proceeded with great diligence and at great expense to complete the railway system which it was authorized to construct under the charter and ordinances above set forth, the route of your orator being from a terminus at the corner of Charles and Lexington streets, thence eastwardly to North street, northwardly to North avenue, and westwardly to Oak street, from which point your orator is building a double-track electric railway northwardly to Lake Roland, a distance of about eight miles, and has already in operation its electric railway, running westwardly out North avenue to Mt. Holly, a distance of about five miles, so that your orator's railway when completed will be about fourteen miles in length, and it is necessary that all the cars traveling over this system shall start from the terminus at Charles and Lexington streets and proceed along Lexington street to North avenue.

X. That part of said railway which is being constructed upon the faith of said ordinances and charters is being built as an elevated railway, beginning at a point on North street, near Lexington street, and extending up North street to a point between Chase and Eager streets, a distance of about 4,000 feet; and that this elevated and costly structure is now rapidly approaching completion, one of the great stone abutments having been entirely finished, the other begun; the expensive foundation for about one hundred iron piers finished, and the steel superstructure under contract with the

Pennsylvania Steel Company practically completed, and now being delivered on the ground for immediate erection; and that the entire overhead-line work is completed, all of the new cars built by the Pullman Palace Car Company have arrived; the great stone car barn and power-house are rapidly approaching completion, and everything being made ready for the operation of the entire system within the next sixty days; and your orator shows to this court that on the faith of the said ordinances it has actually expended in cash over five hundred thousand dollars, and is under contract for the payment of about five hundred thousand dollars additional.

XI. That the said ordinance No. 23, whereby among other powers granted, your orator was authorized to construct double tracks on Lexington street, between Charles and North street-, was introduced into the first branch of the city council on November
120 17th, 1890, and public announcements were at once made by the North Avenue Company of its exact plans, both by advertisement in the daily press, and by a printed pamphlet circulated among property-holders along the entire route of the proposed extension; a great number of public meetings were held by the joint standing committee on city passenger railways, and the ordinance was thus subjected to the scrutiny of the public for nearly five months, during which time many persons owning property on Lexington street between Charles and North streets, advocated its passage, and not a single property-holder on Lexington street opposed its passage.

XII. That in the latter part of October, 1892, your orator, being about to construct its double tracks on Lexington street, between Charles and North street- (its overhead-line work having progressed nearly to completion between these points), applied to the city commissioner for his approval of the location and grade of said tracks; the said ordinance requiring that said double tracks should be laid under the supervision of the city commissioner, and your orator was then informed for the first time by the mayor, with whom the city commissioner conferred, that he thought the double tracks would unduly obstruct Lexington street between North and Calvert streets. No objection being then urged against the obstruction of the double tracks between Charles and Calvert streets; but both the mayor and city commissioner, after they had requested your orator to use only a single track between North and Calvert streets, and your orator had refused, requested your orator to place the double tracks between North and Calvert streets immediately against the south curb line of Lexington street, and thereupon the city commissioner approved the plan for laying said tracks, which is indicated on the accompanying plat filed herewith as part hereof and marked Plaintiff's Exhibit No. 7, which shows in detail the location of your orator's tracks as now constructed on Lexington street, and the exact width of the street at all the corners; and also on a plan of that part of your orator's road which lies between North and Calvert streets, made the following endorsements: "The city law officer having given it as their opinion that the Lake Roland Elevated Railway Company has the right under the provisions of

ordinance No. 23, approved April 8th, 1891, to lay double tracks on the bed of Lexington street between North and Calvert streets, I certify that the plan set forth on this plat, is, in my opinion the least objectionable that can be adopted," a copy of which plan, with said endorsement, is herewith filed as Plaintiff's Exhibit No. 8.

XIII. That the property which binds on the south side of Lexington street, the whole distance between Calvert and St. Paul street,- is the property of the mayor and city council of Baltimore, on which is erected the court-house and record office, neither of which come near the building line; in fact, they are more than 13 feet from said line; and if the tracks of your orator's road, between said two streets, were laid in the same position, relative to the said south side of the said street that was indicated by the city commissioner for the location of its tracks relative to the north side of the said street between North and Calvert street-, there would remain a driveway on the north side of said street, between
121 Calvert and St. Paul streets, of not less than 10 feet; and your orator, if it had been so requested, would have laid its tracks, between Calvert and St. Paul streets, in the way herein suggested.

XIV. That your orator commenced on the morning of the 31st day of October, 1892, laying its tracks on Lexington street, beginning at North street. That some objection was made by the city commissioner as to the manner in which the work was being done; and that, after consultation with the said city commissioner, he signed the Plaintiff's Exhibit No. 8, heretofore filed with this bill. That said signature was placed upon said exhibit on the 3rd day of November, 1892.

That your orator then proceeded, on the 3rd and 4th of November, to continue its work of laying its tracks on Lexington street between North and Calvert streets. That on the 7th day of November your orator procured a special permit, with the consent of the mayor, to use a steam plough, for the purpose of ploughing up Lexington street between Calvert and Charles streets, in order to expedite the work upon said street. The work was continued on Monday, the 7th, and on Monday night, in conformity with the plans as shown by the Plaintiff's Exhibit No. 7. That the president of your orator, on Tuesday, the 8th, received a letter from the mayor, in the following words:

NOVEMBER 7TH, 1892.

James L. McLane, Esq., president Lake Roland Elevated Railway Co.

DEAR SIR: I notice that your company has commenced laying a double track on Lexington street, between North and Calvert streets. I wish to inform you that, as I had already indicated, I think the public interest requires that no more than a single track should be laid on that portion of Lexington street.

The city law officers have informed me that it is competent for the city council to pass an ordinance prohibiting the laying of a double track there. At the next session of the council an ordinance will be introduced prohibiting your company from laying double

tracks on the portion of Lexington street between North street and the east side of Calvert street.

I write you this to prevent you going to the unnecessary expense of laying a system of double tracks and afterwards being required to remove them.

Yours very respectfully,

FERDINAND C. LATROBE, *Mayor.*

This letter is herewith filed as part hereof and marked Plaintiff's Exhibit No. 9; and at the same time the president of your orator received a letter from the city solicitor in the following words, which letter is herewith filed as part hereof and marked Plaintiff's Exhibit No. 10.

NOVEMBER 7TH, 1892.

DEAR SIR: At the request of the mayor I am preparing an
122 ordinance to prohibit the North Avenue R. R. Company from laying or maintaining more than a single track on Lexington street between North and Calvert.

If you desire to see this ordinance or to talk with me about its provisions, I will be glad to see you at my office, No. 208 Courtland street, on either Wednesday the 9th, instant, or Thursday the 10th.

The ordinance will probably be sent to the city council at the first session.

Yours truly,

W. S. BRYAN,
City Solicitor.

That after receiving the above letters your orator continued the work of laying down said tracks.

And your orator shows that neither in the said letters, nor in any way, nor at any time, did either the mayor or city commissioner, or any other person indicate to your orator that any opposition would be made to the laying of your orator's double tracks on Lexington street, between Charles and Calvert streets, and that your orator proceeded to lay said double tracks with all convenient speed, with a view to causing as little inconvenience as possible to the traveling public. That your orator's president saw the draft of the hereinafter referred to ordinance approved November 18th, 1892, for the first time, in the office of the city solicitor, on the afternoon of the 12th day of November, 1892, two days before it was introduced in the city council.

XV. That by ordinance No. 1, approved 18th November, 1892, of the mayor and city council of Baltimore, it is provided that said ordinance No. 23 is repealed, so far as it authorizes your orator to lay down double tracks on Lexington street, between Charles street and North street, and requires you forthwith to reduce its said double tracks to a single track, with the further provision that unless said reduction is made within twenty days after the approval of said ordinance, all of the rights of your orator on Lexington street shall thereby become forfeited, all of which will more fully appear by reference to said ordinance, a copy of which is filed herewith marked Plaintiff's Exhibit No. 11.

XVI. That acting upon the supposed authority conferred upon him by said ordinance, the said city commissioner has announced his intention of tearing up and removing all of the tracks of your orator on Lexington street between Charles street and North street unless the said double track is reduced to a single track on or before December 1st, 1892, as appears by reference to the notice herewith filed and marked Plaintiff's Exhibit No. 12. And your orator avers that if all said tracks are removed it will become impossible for your orator to reach its terminus at the corner of Charles and Lexington street- and your orator will suffer great and irreparable damage.

XVII. That it will not be reasonably practicable to successfully and safely conduct its railway business on Lexington street if confined to a single track on that street, between Charles and North street-, because its cars will be propelled by electricity at a high
123 rate of speed, and in the morning and evening, when travel becomes congested and great number of cars are coming in and going out over the two branches of your orator's road, it will become necessary to run cars on Lexington street at intervals of three or two minutes, and sometimes at the interval of one minute apart, which cannot be done with a single track on Lexington street; and it being impracticable and dangerous to keep the cars of your orator on the steep descent from the elevated structure, the requirement of a single track from North street to Charles street would lead to such delay and confusion as would make the convenient and proper operation of your orator's road on Lexington street impracticable.

And your orator further avers that the right to have one of the termini of its road at the corner of Charles and Lexington street- is, because of the location of said terminus and its relation to the business thoroughfares of the city—a very valuable right; and if deprived of the right to come to said terminus such deprivation will very materially and seriously reduce the revenue to be derived from the operation of its road.

XVIII. That by ordinance No. 50, of the mayor and city council of Baltimore, approved April 18th, 1892, a copy of which is herewith filed, marked "Complainant's Exhibit No. 12*a*," the Baltimore, Canton and Point Breeze R. R. Company, against the protest of your orator, was granted the right to lay down double tracks on Lexington street, between Holiday and North street-, and to use the double tracks to be laid by your orator on Lexington street between North and Calvert street-, in conformity with the reservation in said ordinance No. 23; wherefore your orator shows that your orator's tracks on Lexington street, between North street and Calvert, will be subject to an additional servitude, which would still further increase the difficulties of operating it with a single track between those points. Your orator is informed, however, that it is the purpose of the mayor to recommend the restrictions of the said Baltimore, Canton and Point Breeze R. R. Company to the use of a single track between North and Holiday streets.

XIX. Your orator avers that the said ordinance No. 1, of November 18th, 1892, was pressed by the mayor on the city council at its

first meeting for organization, before any committees were appointed, and was passed through both branches, under a suspension of the rules, in a single night.

XX. Your orator avers, as a matter of fact, that Lexington street, between St. Paul street and Charles, is of the same width as Charles street between Baltimore street and Saratoga street, upon which latter street, a double-track street railway has been in operation since 1872, without objection. That by ordinance No. 102, approved October the 8th, 1892, a copy of which is herewith filed and marked "Plaintiff's Exhibit No. 13," the Baltimore City Passenger Railway Company was granted the right to lay an additional track on Gay street, between Jones' falls and Chestnut street, a distance of three squares; the width of said street is shown upon the plat herewith filed and marked "Plaintiff's Exhibit No. 14;" and, as will appear by said plat, the width of a portion of said part of said Gay street, is the same as the width of Lexington street, between North and Calvert street-.

124 Your orator further states, that on Lombard street, between Exchange place and Gay street, the traction company is now operating a double-track cable road; that the tracks of said road are placed like the tracks of your orator's road are placed on Lexington street; it is the north track which is placed next to the north curb, leaving ten feet three inches between the southern rail and the south curb of the street, which is less than the distance between the north rail of your orator's road and the north curb of Lexington street, between North and Calvert streets, which is 11 feet 7 inches.

Your orator files herewith a plat, showing the location of the traction company's road, on Lombard street, which is marked Plaintiff's Exhibit No. 15, and made part of this bill.

Your orator avers that the rails of its road are laid flush with the pavement of the street, and offer no other or greater obstacle or interference with the travel on the street than the rails of the horse-car lines do; in fact, the rails are of the same kind as the rails used by horse-car lines.

Your orator further avers that all the streets above mentioned, to wit: Gay, Lombard and Charles streets are main thoroughfares of the city, used to a greater extent by conveyances of every description, than Lexington street is used between North and Charles street-. That the right to use electricity has been granted to the company now using Charles street, and that poles have been placed upon Charles street with a view of using electricity upon said line, and that the power used upon Lombard street is the cable, and that the power proposed to be used upon Gay street is that of the cable.

XXI. Your orator avers that the said ordinance is void and beyond the power of the mayor and city council, and is in defiance of, and in derogation of the lawful and vested rights of your orator, and in violation of the Constitution of the United States and of the State of Maryland.

To the end, therefore:

1. That the mayor and city council of Baltimore, its agents, officers, servants and employees, and Alfred E. Smyrk, the city commissioner of Baltimore city, his agents, servants and employees, they and each and all of them may be enjoined from tearing up the tracks of your orator on Lexington street, between Charles street and North street. or in any manner interfering with your orator in the completion of said tracks, and the use of them for its railway business, or in any manner preventing or interfering with your orator in the construction, maintenance and use of double tracks for its passenger railway, on Lexington street, between Charles street and North street, in the manner and with the powers and privileges set out in ordinance No. 23, of the mayor and city council, of Baltimore, approved April 8th, 1891.

2. That the said ordinance of the mayor and city council, approved November 18th, 1892, may be declared null and void.

3. That your orator may have such other and further relief as its case may require.

125 May it please your honor to grant unto your orator the writ of subpœna directed to the mayor and city council of Baltimore, and to Alfred E. Smyrk, city commissioner of Baltimore city, commanding them to appear in this court on some day to be named therein to answer the premises, and abide by and perform such decree or decrees as may be passed therein.

And as in duty bound.

LAKE ROLAND ELEVATED
RAILWAY COMPANY,
By J. L. McLANE, *President.*

WILLIAM A. FISHER,
BERNARD CARTER,
STEELE, SEMMES & CAREY,
Solicitors for Plaintiff.

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

I hereby certify that on this thirtieth day of November, in the year eighteen hundred and ninety-two, before me, the subscriber, a justice of the peace of the State of Maryland, in and for Baltimore city aforesaid, personally appeared James L. McLane, the president of the Lake Roland Elevated Railway Company, and made oath in due form of law, that the matters and facts set forth in the foregoing bill of complaint are true and *bona fide* as therein set forth.

GEO. McCAFFRAY.

Order of Court on Aforegoing Bill.

(Filed 30th November, 1892.)

In the Circuit Court of Baltimore City.

LAKE ROLAND RAILWAY COMPANY
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*

Ordered by the court this 30th day of November, A. D. 1892, that the injunction be issued in accordance with the prayer of the foregoing bill, unless sufficient cause to the contrary be shown by the defendant on or before the 7th day of December next, provided a copy of this order be served on the defendant or the city solicitor, Mr. Ryan, on or before the 1st day of December next.

J. UPSHUR DENNIS.

Service of which said order appears by the following admission thereon endorsed, to wit:

"Service of copy of bill and order admitted and subpœna waived." Nov. 30, 1892.

WM. J. BRYAN, JR.

126 PLAINTIFF'S EXHIBIT NO. 1.

(Filed with the bill of complaint 30th November, 1892.)

Certificate of Incorporation of the North Avenue Railway Company of Baltimore City.

Know all men by these presents, that we, Isaac S. George, Frank Slingluff, Miles White, Jr., Boston Fear, Louis Johnson, John M. Denison and Wallace King, being citizens of the United States, and a majority of whom are citizens of the State of Maryland, do hereby certify that we do, under and by virtue of the general laws of this State, authorizing the formation of corporations, hereby form a corporation under the name of the North Avenue Railway Company of Baltimore City.

Second. We do further certify, that the said corporation so formed is a corporation for the purpose of constructing and running a passenger railway in the city of Baltimore, the whole line of said road being located in said city, and the termini of said road being therein; and that the term of existence of the said corporation is limited to forty years; and that the said corporation is formed upon the articles, conditions and provisions herein expressed, and subject in all particulars to the limitations relating to corporations, which are contained in the general laws of this State.

Third. We do further certify, that the aggregate of the capital stock of the said corporation is twelve thousand dollars, and that

the said capital is divided into one hundred and twenty shares of the par value of one hundred dollars each.

In witness whereof, we have hereunto set our hands and seals, this sixth day of May, A. D. 1889.

ISAAC S. GEORGE.
FRANK SLINGLUFF.
MILES WHITE, JR.
BOSTON FEAR.
LOUIS JOHNSON.
JNO. M. DENISON.
WALLACE KING.

Test: G. E. REARDON.

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

Before the subscriber, a justice of the peace of the State of Maryland, in and for the city of Baltimore, personally appeared, on this sixth day of May, A. D. 1889, Isaac S. George, Frank Slingluff, Miles White, Jr., Boston Fear, Louis Johnson, John M. Denison, and Wallace King, and did severally acknowledge the aforegoing certificate to be their act and deed.

G. EVETT REARDON, *J. P.*

127 STATE OF MARYLAND, *Baltimore City,* } *sct:*

I hereby certify, that G. Evett Reardon, Esquire, before whom the annexed acknowledgments were made, and who has thereto subscribed his name, was, at the time of so doing, a justice of the peace, of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgments. I further certify, that I am acquainted with the handwriting of the said justice, and verily believe the signature to be his genuine signature.

In testimony whereof, I hereunto set my hand and affix
[L. S.] the seal of the superior court of Baltimore city, this 7th day of May, A. D. 1889.

JAS. BOND,
Clerk of the Superior Court of Baltimore City.

I, J. Upshur Dennis, one of the judges of the supreme bench, of Baltimore city, do hereby certify that the foregoing certificate has been submitted to me for examination; and I do further certify that the said certificate is in conformity with the provisions of the law, authorizing the formation of said corporations.

J. UPSHUR DENNIS.

THE STATE OF MARYLAND:

I hereby certify, that the foregoing is truly copied from Record Book of Incorporations now in the office of the secretary of state, folios 261, 262 and 263; and I do further certify that the original

certificate of incorporation was filed and recorded in this office on the seventh day of May, A. D. 1889.

Witness my hand and the seal of this office. Done at the [L. S.] city of Annapolis, on the twelfth day of May, in the year of our Lord eighteen hundred and ninety-one.

E. W. LE COMPTE,
Secretary of State of State of Maryland.

PLAINTIFF'S EXHIBIT No. 2.

(Filed with the bill of complaint 30th November, 1892.)

Agreement of consolidation between the North Avenue Railway Company of Baltimore City and the Baltimore, Hampden and Lake Roland Railroad Company, formerly Lake Roland Elevated Railroad Company.

This agreement of consolidation, made this 20th day of April, in the year eighteen hundred and ninety-two, by and between the North Avenue Railway Company of Baltimore City, and the Baltimore, Hampden and Lake Roland Railroad Company, both corporations of the State of Maryland, duly incorporated:

Whereas, by the act of 1892, chapter 232 of the act of the General Assembly of Maryland, the Baltimore, Hampden and
128 Lake Roland Railroad Company was duly authorized, either before or after its completion, to consolidate with any railroad company heretofore or hereafter incorporated under the laws of the State, whose railroad should connect with or form a continu*ance* line with the railroad of the said Baltimore, Hampden —; and by the act of 1890, chapter 217, the North Avenue Railroad Company of Baltimore City was duly authorized to consolidate with such other roads as it might cross or connect with; and the Baltimore, Hampden and Lake Roland Railroad Company connects with and forms a continuous line with the North Avenue Railway Company of Baltimore City at the intersection of Oak street and North avenue in said Baltimore city; and by the act of 1890, chapter 553, it is provided that it shall be lawful for any railroad company heretofore or hereafter incorporated, to consolidate with any other railroad company incorporated under the laws of this State, whose railroad shall connect with or form a continuous line with the railroad of the company so consolidated upon such terms as may be agreed upon; provided, however, that the agreement for such consolidation shall be submitted to the stockholders of said company at special meetings called for considering the same, and shall be sanctioned by the holders of a majority of the stock of such companies, and if sanctioned at such meetings by such holders of the majority of the stock shall be filed in the office of the secretary of state of the State of Maryland.

And whereas, it is provided by the said act of 1892, chapter 232, that in case of the consolidation of the said Baltimore, Hampden and Lake Roland Railroad Company, with any other railroad com-

pany, the agreement for such consolidation shall be submitted to the stockholders of both of said corporations at special meetings called for considering the same, and shall be sanctioned by the holders of a majority of the outstanding — of each of said corporations, and if sanctioned by such meetings the said agreement shall be filed in the office of the secretary of state of the State of Maryland, and that the said agreement shall state the capital stock of the consolidated company, its corporate title, the number of its directors, the method of exchanging the stock of the consolidated company for the stock of the constituent companies and a method for valuing the shares of stock of such stockholders of either of said constituent companies who refuse to make such exchange and to secure to such stockholders the fair value of their said stock and shall prescribe such other terms and conditions for the management of said consolidated corporation as may be thought proper; and the said consolidated corporation is, by said act, authorized to mortgage its property and franchises to secure negotiable bonds to an amount not exceeding its authorized capital stock, as fixed by said agreement, or as afterwards increased in the manner provided in article 23, section 165 of the Public General Laws of Maryland.

And whereas, the respective boards of directors of the said North Avenue Railroad Company of Baltimore City and of the said Baltimore, Hampden and Lake Roland Railroad Company, met at their general offices in the city of Baltimore on the second day of April, in the year eighteen hundred and ninety-two, and by resolutions passed at said meeting, determined that it was desirable that
129 the said North Avenue Railway Company of Baltimore City, and the said Baltimore, Hampden and Lake Roland Railroad Company should be consolidated in pursuance of and in conformity with the above-recited provisions of law, and that this agreement of consolidation should be prepared for submission to meetings of the stockholders of the said corporations.

Now, therefore, this agreement of consolidation, witnesseth; that in consideration of the premises, the said North Avenue Railway Company of Baltimore City, and the said Baltimore, Hampden and Lake Roland Railroad Company, do hereby agree that upon the due approval of this agreement by the holders of not less than a majority of the outstanding stock of each of said corporations, at special meetings called for considering the same (which approval shall be indicated by certificates of the respective secretaries of said special meetings, attested by the seals of said respective corporations, to be attached to this agreement), and upon the filing of this agreement in the office of the secretary of state of the State of Maryland. The said agreement shall thenceforth be decreed and taken to be the agreement and act of consolidation of the said corporations, and thereupon they shall be and become one corporation by the name and under the corporate title of "Lake Roland Elevated Railway Company."

And the said corporations do further agree with each other as follows:

I. That the said consolidated corporation shall be vested with,

subject to, and regulated by the corporate rights, privileges, franchises, duties and obligations existing and applicable to the corporations aforesaid, except in so far as the same may be altered under and by virtue of this agreement of consolidation.

II. That all the property, real and personal, as well as other things, in action belonging to each of said corporations, shall be taken and deemed to be transferred to and vested in the said consolidated corporation, without further act or deed, and all rights of way and all other interests shall be as effectually the property of the said consolidated corporation as they were the property of the said North Avenue Railway Company of Baltimore City, or of the Baltimore, Hampden and Lake Roland Railroad Company.

III. That no franchises, rights, estates, titles to real estate or rights of property of any kind, either by deed or otherwise, vested in either of said corporations, shall be deemed to revert or be in any way impaired by reason of this agreement of consolidation, and generally and specially the said consolidated corporation shall be, and it is hereby entitled to have, possess and exercise, in the ownership, control and management of all of its affairs and corporate property, and every part thereof, all and singular, the franchises, rights, powers and privileges, which either or both of the corporations parties here were entitled to have or possess at the date of this agreement of consolidation, including especially the right to consolidate, lease or purchase, or sell or lease its franchises and property to any other railroad which it may cross or connect with.

130 IV. That where the franchises, rights, powers and privileges of the said two corporations are in any manner inconsistent, and there is a conflict in the exercise thereof by the said consolidated corporation, or in their application to the administration of the affairs of said company, from time to time, then and in that event the said consolidated corporation shall act in accordance with, and be governed by such of the terms and conditions thereof as in the judgment of its board of directors shall best promote its interests.

V. That the aggregate of the capital stock of the said consolidated corporation shall be one million dollars, divided into twenty thousand shares of fifty dollars each, with power to increase the same in the manner provided in article 23, section 165, of the Public General Laws of Maryland.

And whereas the corporate property and franchises of the said North Avenue Railway Company of Baltimore City, include several miles of track with equipment, the right to build an elevated railway on North street, and valuable street franchises and terminals in said city of Baltimore, and it is therefore proper and necessary that there should be an equitable adjustment and equalization in exchanging the stock of the said consolidated corporation for the stock of the said constituent corporations; it is therefore agreed and determined hereby, that the method of exchanging the stock of the said constituent corporations for the stock of the said consolidated corporation, shall be as follows:

(*a.*) There being outstanding twenty-five thousand dollars of full-

paid capital stock of the said Baltimore, Hampden and Lake Roland Railroad Company, divided into five hundred shares of fifty dollars each, the said consolidated corporation shall issue one full-paid share of its capital stock in exchange for and in lieu of each of said full-paid shares of the capital stock of the said Baltimore, Hampden and Lake Roland Railroad Company.

(*b.*) There being outstanding two hundred and seventy-five thousand dollars of full-paid capital stock of the said North Avenue Railway Company of Baltimore City, divided into five thousand and five hundred shares of fifty dollars each, the said consolidated corporation shall issue three and one-half full-paid shares of its capital stock in exchange for and in lieu of each of said full-paid shares of the capital stock of the said North Avenue Railway Company of Baltimore City.

Before any new certificates of stock shall be demanded from the said consolidated corporation by any stockholder in either of said constituent companies, he must first surrender up to said consolidated corporation for cancellation the certificates issued him by said constituent corporations.

VI. That any stockholder or subscriber to the stock of either of said constituent companies, who shall refuse to convert his stock into the stock of the said consolidated corporation, may, at
131 any time within thirty days after the adoption of this agreement of consolidation, notify the board of directors of his refusal, in writing, and thereupon the matter of such refusal shall be referred to the arbitration of three disinterested persons, one of whom shall be appointed by said board of directors, one by the refusing stockholder, and the third shall be selected by the two thus appointed, and the said arbitrators shall estimate the damage, if any, done to such stockholder by said consolidation, and their award, or that of a majority of them, shall be final and conclusive, and the said arbitrators shall also appraise said stock of such stockholder at the full market value thereof, without regard to any depreciation or appreciation in consequence of the said consolidation, and the said consolidated corporation may, at its election, either pay the said stockholder the amount of damages so found and awarded, if any, or the value of the stock so ascertained and determined, and upon the payment of the value of the stock as aforesaid, the said stockholder shall transfer the stock so held by him to the said company, to be disposed of by the directors of said company, or to be retained for the benefit of the remaining stockholders, but the said consolidated corporation shall be required to pay either said damages, if any, or the appraised value of the said stock (whichever it shall elect) to the said stockholder within thirty days after the award of said *arbatratas* shall be filed in writing with the board of directors.

VII. That the board of directors of the said consolidated corporation shall consist of seven stockholders, who are hereby authorized and empowered to exercise all the powers vested in the said consolidated corporation; and the said board of directors shall elect from their number a president, a vice-president, and they shall also ap-

point such other officers and agents, whether directors or not, as they may deem proper, and prescribe rules and regulations for their conduct, and the said board of directors is also hereby authorized to fill vacancies in their number caused by resignation or otherwise, and the names of the directors who are to manage the said consolidated corporation, until others are chosen in their stead by the stockholders of the said corporation, as shall be provided by the by-laws, are the following: William H. Whitridge, Jesse Hilles, Samuel M. Jarvis, Roland R. Conklin, Lawrason Riggs, Frank Slingluff and Edward H. Benton.

VIII. That the said North Avenue Railway Company of Baltimore City does hereby constitute and appoint Frances K. Carey to be its attorney for it and as its corporate act and deed to acknowledge this agreement of consolidation; and that the said Baltimore, Hampden and Lake Roland Railroad Company does hereby constitute and appoint Edward H. Benton to be its attorney for it and as its corporate act and deed to acknowledge this agreement of consolidation.

As witness the corporate seal of the said North Avenue Railway Company of Baltimore City, and of the said Baltimore, Hampden and Lake Roland Railroad Company attested by the sig-
132 natures of their respective presidents the day and year first above written.

WM. H. WHITRIDGE,
President of the North Avenue Railway Company of Baltimore City.

[L. S.] Attest: LAWRENCE N. FREDERICK, *Secretary.*

WH. M. WHITRIDGE,
President of the Baltimore, Hampden and Lake Roland Railroad Company.

[L. S.] Attest: LAWRENCE N. FREDERICK, *Secretary.*

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

I hereby certify that on this 20th day of April in the year 1892 before me the subscriber, a justice of the peace of the State of Maryland in and for Baltimore city aforesaid personally appeared Edward H. Benton, the attorney named in the foregoing agreement on the part of the Baltimore, Hampden and Lake Roland Railroad Company, and acknowledged the foregoing agreement to be the corporate act and deed of the said Baltimore, Hampden and Lake Roland Railroad Company; and at the same time personally appeared before me also Francis K. Carey, the attorney named in the foregoing agreement on behalf of the North Avenue Railway Company of Baltimore City, and acknowledged the foregoing agreement to be the corporate act and deed of the said North Avenue Railway Company of Baltimore City.

JNO. T. MADDOX, *J. P.*

STATE OF MARYLAND, *Baltimore City,* } *sct:*

I hereby certify that John T. Maddox, Esquire, before whom the annexed acknowledgment and affidavit were made, and who has thereto subscribed his name, was at the time of so doing a justice of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the handwriting of the said justice and verily believe the signature to be his genuine signature.

In testimony whereof I hereto set my hand and affix the [L. S.] seal of the superior court of Baltimore city this 20th day of April A. D. 1892.

JAS. BOND,
Clerk of the Superior Court of Baltimore City.

133 *Certificate of Secretary.*

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

I, Lawrence N. Frederick, secretary of the Baltimore, Hampden and Lake Roland Railroad Company, do hereby certify that at a meeting of the stockholders of the said corporation, duly convened at the principal office of the said corporation in the city of Baltimore on the 20th day of April in the year 1892, by adjournment from April 16th, 1892, at which I was duly appointed secretary, the foregoing agreement of consolidation was submitted to the stockholders assembled at said meeting and was read by me to the said stockholders, and that the said agreement was sanctioned by the holders of more than a majority of the outstanding stock of said company, and that more than a majority of the outstanding stock of said company was present at said meeting, and that more than a majority of the outstanding stock of said company voted in favor of the adoption and execution of the above and foregoing agreement and the consolidation therein provided for, and I do further certify that the said meeting was a special meeting called in conformity with law for the purpose of considering the propriety of the said consolidation and the terms upon which said consolidation should be made, and that the published call for said meeting so notified the stockholders of said company.

In testament whereof I have herewith subscribed my name and affixed the corporate seal of the said Baltimore, Hampden [L. S.] and Lake Roland Railroad Company this 20th day of April, in the year eighteen hundred and ninety-two.

LAWRENCE N. FREDERICK,
Secretary of the Baltimore, Hampden and Lake Roland Railroad Company, at a Special Meeting.

Certificate of Secretary.

STATE OF MARYLAND, *Baltimore City.* } *To wit:*

I, Lawrence N. Frederick, secretary of the North Avenue Railway Company of Baltimore City, do hereby certify that at a meeting of the stockholders of the said corporation, duly convened at the principal office of the said corporation, in the city of Baltimore, on the 20th day of April, in the year 1892, by adjournment from April 16th, 1892, at which I was duly appointed secretary, the aforegoing agreement of consolidation was submitted to the stockholders assembled at said meeting, and was read by me to the said stockholders, and that the said agreement was sanctioned by the holders of more than a majority of the outstanding stock of said company was voted in favor of the adoption and execution of the above and aforegoing agreement and the consolidation therein provided for; and I do further certify that the said meeting was
134 a special meeting, called in conformity with law, for the purpose of considering the propriety of the said consolidation, and the terms upon which said consolidation should be made, and that the call for said meeting so notified the stockholders of said company.

In testimony whereof, I have hereunto subscribed my name and affixed the corporate seal of the said North Avenue
[L. S.] Railway Company of Baltimore City, on this 20th day of April, in the year eighteen hundred and ninety-two.

LAWRENCE N. FREDERICK,
Secretary of the North Avenue Railway Company of Baltimore City.

THE STATE OF MARYLAND:

I hereby certify that the aforegoing is truly copied from Record Book of Acceptances, Consolidations, &c., now in the office of the secretary of state, folios 99, 100, 101, 102, 103, 104 and 105; and I do further certify that the original certificate of consolidation was filed and recorded in this office on the twentieth day of April, A. D. 1892.

Witness my hand and the seal of this office. Done at the
[L. S.] city of Annapolis on the twenty-ninth day of November, in the year of our Lord eighteen hundred and ninety-two.

E. W. LECOMPTE,
Secretary of State of State of Maryland.

PLAINTIFF'S EXHIBIT No. 3.

(Filed with the bill of complaint 30th November, 1892.)

Ordinance No. 23, of the mayor and city council of Baltimore, approved April 8th, 1891, entitled "An ordinance to authorize the

construction of city passenger railway tracks by the North Avenue Railway Company of Baltimore City, on North avenue from McCulloh street to Guilford avenue, and thence on Guilford avenue and North street to Lexington street, and thence on Lexington street to Charles street, and on North street to the north side of Fayette street." (*Vide* agreement as to record in this case.)

PLAINTIFF'S EXHIBIT No. 4.

(Filed with the bill of complaint 30th November, 1892.)

Ordinance No. 47, of the mayor and city council of Baltimore, approved April 8th, 1892, entitled "An ordinance supplementary to ordinance No. 150, approved October 25th, 1880, and to authorize the Baltimore Union Passenger Railway Company to use electricity as a motive power upon its railways in the city of Baltimore." (*Vide* agreement as to record in this case.)

135 PLAINTIFF'S EXHIBIT No. 5.

(Filed with the bill of complaint 30th November, 1892.)

The Baltimore Union Passenger Railway Company Agreement with the North Avenue Railway Company.

This agreement, made this eighth day of April, in the year eighteen hundred and ninety-two, by and between the Baltimore Union Passenger Railway Company, a corporation duly incorporated under the laws of the State of Maryland, party of the first part, and the North Avenue Railway Company of Baltimore City, a like corporation, of the second part.

Whereas the party of the first part has constructed certain double passenger railway tracks on North avenue, between Guilford avenue and Madison avenue, as follows: From said Guilford avenue westwardly to St. Paul street, and from McMechen street westwardly to Madison avenue, of which certain portions have been constructed with the view of using electricity upon the same, and certain portions, to wit: Between John street and Park avenue, and Charles street, and St. Paul street remain to be fitted for such use;

And whereas the said North Avenue Railway Company of Baltimore City has constructed certain other passenger railway tracks in said North avenue between said Guilford avenue and Madison avenue;

And whereas the city council of Baltimore passed an ordinance which was submitted to the mayor for his approval on March 11th, 1892, which has been approved by the mayor, which said ordinance in the third section thereof provided as follows:

"And whereas public convenience requires that two tracks only should be used on North avenue—

"Therefore, be it enacted and ordained that the Baltimore Union

Passenger Railway Company shall permit the North Avenue Railway Company of Baltimore City to use the tracks of said Baltimore Union Passenger Railway Company on North avenue from Madison avenue to Guilford avenue, upon terms to be agreed upon between them, and upon condition that the Baltimore Union Passenger Railway Company shall have the joint right to the use of the poles, cross-arms and appurtenances of the North Avenue Railway Company of Baltimore City between the streets aforesaid, in order to avoid the necessity of duplicating such structures on North avenue; provided, however, if the said two companies cannot agree upon the terms upon which said tracks are to be used the matter shall be referred to the arbitration of the mayor and city commissioner, and the terms fixed by the mayor and city commissioner shall be binding upon both parties thereto. 'The said Baltimore Union Passenger Railway Company, by accepting this ordinance, or acting thereunder, shall be deemed to have given its assent to the use of its tracks between the points named upon the conditions aforesaid,' and the North Avenue Railway Company of Baltimore City is hereby required to remove its track on North avenue (the Baltimore Union Passenger Railway Company to pay one-half of
136 the cost of said removal), between Madison avenue and Guilford avenue, upon its making the arrangement for the use of the Baltimore Union Passenger Railway Company's tracks upon the terms provided in the ordinance, and if the said North Avenue Railway Company of Baltimore City shall not, within sixty days after the passage of this ordinance, consent to the use jointly of the tracks of the Baltimore Union Passenger Railway Company on North avenue, upon the terms and in the manner prescribed by this ordinance, then and in that event the mayor and city commissioner are hereby authorized and directed to give to the said North Avenue Railway Company of Baltimore City the one year's notice to remove, at its expense, all its poles and overhead wires that it may have erected on North avenue, as provided in section four of ordinance twenty-three, approved April 8th, 1891, relating to the constructing of passenger railway tracks by the said North Avenue Railway Company.

And whereas the mayor and city commissioner, under the authority vested in them in the third section of said ordinance hereinbefore first referred to, have determined as follows: 1. That the North Avenue Railway Company shall remove its tracks from North avenue between the parts above referred to. 2. That the Baltimore Union Passenger Railway Company shall pay one-half of the cost of the removal of said tracks and shall permit the North Avenue Railway Company to have a full and fair use of the tracks of the said Baltimore Union Passenger Railway Company from Madison avenue to Guilford avenue, and for one square east of Guilford avenue on North avenue. 3. That the Baltimore Union Passenger Railway Company shall pay one-half of the cost of the poles erected for the trolley system on North avenue by the North Avenue Railway Company and on all such portions of the line as shall be used jointly by said companies, and also one-half of the cost of the main-

tenance thereof, and only one set of trolley poles shall be used by said companies on that portion of the line jointly used, the expense of which shall be equally borne by the two companies. 4. That the North Avenue Railway Company shall pay one-half of the cost of so much of the tracks and one-half of the cost of maintenance thereof, on the line of North avenue, as may be used jointly by both companies.

And whereas the Baltimore Union Passenger Railway Company has assented unto the terms of said ordinance, and the said North Avenue Railway Company of Baltimore City has agreed to comply with and perform the obligations therein mentioned to be fulfilled by it.

Now, therefore, in consideration of the premises, and for the purpose of adjusting the terms and conditions upon which the said North Avenue Railway Company of Baltimore City shall use the tracks of said Baltimore Union Passenger Railway Company hereinafter referred to, and of settling the terms and conditions under which the said Baltimore Union Passenger Railway Company shall use the poles, cross-arms and appurtenances so placed upon said North avenue, being the property of the party of the second part, between the points first above mentioned, it is hereby mutually covenanted and agreed as follows:

137 First. The said North Avenue Railway Company of Baltimore City does hereby agree to remove its tracks situated on North avenue wherever the same may be, between Madison avenue and Guilford avenue, said removal to take place when the tracks of the Baltimore Union Passenger Railway Company as hereinbefore mentioned, shall be in a suitable condition for the use of an electric railway. These tracks shall be put in suitable condition within two months from the date of this agreement as hereinafter provided, within which time the tracks of the party of the second part shall be removed. The said Baltimore Union Passenger Railway Company shall pay one-half of the cost of the removal of the said tracks and of the restoration of the street by proper repairs, as required by the city commissioner, said cost to be adjusted between the president of the said companies, and in the event of their disagreement, by reference to the mayor and city commissioner, whose judgment shall be final.

Second. That the said North Avenue Railway Company of Baltimore City shall have the right to use said double tracks of the said party of the first part on said North avenue between Guilford avenue and Madison avenue, upon paying or offering to pay unto the said Baltimore Union Passenger Railway Company one-half of the cost of the same, and the connections with the North Baltimore and City Passenger railways and the one-half of the annual maintenance thereof, including repairs and taxes. The said payment for such one-half interest shall be made within thirty days after the ascertainment of the same, and the annual payments for maintenance and repairs and taxes shall be made upon the first days of January, April, July and October of each year. The one-half of the cost of said tracks shall be agreed upon by the presidents of the respective

parties, and in the event of their failure to agree, the same shall be referred to the mayor and city commissioner, whose decision shall be final. Accounts for maintenace, renewals, repairs and taxes shall be submitted to the party of the second part ten days prior to the expiration of each quarter. The party of the first part hereby agrees to proceed at once to complete the double track railway from Madison avenue to connect with the line of the North Baltimore Railway Company, near McMechen street, on North avenue, and from the east side of Guilford avenue to connect with the North Baltimore line on the west side of Charles street, so that when the said North Avenue Railway Company shall have required the right to run over the tracks of the North Baltimore Company's line of railway, the cars of the North Avenue Railway Company of Baltimore City can be run from Madison avenue along North avenue to its road to be constructed on Guilford avenue. The line hereby provided for shall be constructed as a first-class electric railway. The tracks shall be of sufficient weight and solidity to carry heavy, double-truck electric cars, and shall be in complete order within two months from the date of this agreement, and in case the party of the first part shall fail to complete the same within the time fixed, the party of the second part shall have the right to complete the same and charge one-half the cost to the Baltimore Union Passenger Railway Company. The requirements of the proposed electric railway shall be agreed upon by the presidents of the parties hereto, and in the event of their disagreement the same
138 shall be determined by an electric railway expert, chosen by the mayor and city commissioner, whose decision shall be final. The services of said expert shall be paid equally by the two companies, the party of the first part having the right of use of the tracks situated on North avenue, between Charles and St. Paul streets, jointly with the Baltimore City Passenger Railway Company. It is understood that said party of the first part grants the use of the same to the party of the second part, subject to such joint use by the said City Passenger Railway Company and to the rights of said latter company therein. As the Baltimore City Passenger Railway Company has agreed to cable such portion of said line, of which it has the joint use, and make the connection of its tracks therewith, and as said City Passenger Railway Company is about to commence the construction of such work of cabling, it is agreed that the present track and connections are to be used by the parties hereto, the same being properly bonded for the transmission of the electric current, until said city passenger railway company shall cable said tracks, and in so doing fit the same for electric use, in accordance with its agreement with the party of the first part.

Third. The party of the first part shall be entitled to the use of the poles and cross-arms belonging to the party of the second part, between Madison avenue and Guilford avenue, upon the payment of one-half of the costs of the same and one-half of the annual maintenance, repairs and taxes; difference upon such matters to be adjusted as provided for in the second clause herein, and settlements to be made at corresponding dates. The party of the second part

shall erect and maintain the necessary poles and cross-arms to support electric appliances suitable for the transmission of electricity upon the parts of its line where the same are not now erected, the cost of erection, maintenance, etc., to be adjusted as provided by said second clause.

Fourth. The party of the first part doth hereby grant to the party of the second part the right to use its tracks on North avenue, east of Guildford avenue, for the distance necessary to enable said party of the second part to reach the east side of Barclay street north of North avenue, on similar terms and conditions as referred to in the second section herein, the said party of the second part finishing the curves, connections or special work at its own expense. Should poles and appliances be necessary for such enjoyment of said privilege, the same shall be provided by the said party of the first part upon the terms and conditions mentioned in the second section herein.

Fifth. The said party of the second part does hereby grant to the said party of the first part the right to use its tracks on North avenue west of Madison avenue, for the distance necessary to enable the said party of the first part to reach the west side of McCulloh street north of North avenue, upon the terms and conditions mentioned in the second clause herein, the said party of the first part finishing the curves, connections or special work at McCulloh street, at its own expense.

Sixth. The party of the second part does hereby covenant, that the party of the first part, shall have the right of access to the
139 approaches to the temporary bridge, proposed to be constructed by the mayor and city council over Jones' falls, so far as the party of the second part may have the right to such access, in its own right, or by virtue of its control of any other street railway; including whatever right the Baltimore, Hampden and Lake Roland Railway Company may have. The party of the first part shall have the right to the joint use of such tracks now located, or which may be located, by the party of the second part on the approach or upon said bridge; the use of the same to continue until the new bridge over said stream shall be erected on North avenue. And the said party of the second part does hereby covenant, that such access by said party of the first part unto said temporary bridge, shall include the right to use such portions of the tracks now or hereafter laid on Oak street and First street west of Oak street as may be necessary to reach such temporary bridge; whether said tracks are, or may be, laid by the Baltimore, Hampden and Lake Roland Railway Company, by the party of the second part, or by any other company which it may control by ownership of stock, or in any other manner whatsoever. Nothing herein contained, however, shall prevent the party of the second part making any arrangement with any other company; provided that the use of the same shall not interfere with the convenient user thereof by the party of the first part. The line of railways placed upon First street, west of Oak street, and on the temporary bridge, shall be completed by the parties hereto, and the proper connections made; the cost of

the existing line, and the cost of completing the same with the proper connections, shall be borne by the parties hereto in the following proportions: The party of the first part shall pay one-third of the cost of said line, and the party of the second part two-thirds of the cost; after the use of this portion shall cease, the material shall be sold and divided among the parties hereto in like proportions as the cost thereof. The cost of removal of said tracks and the restoration of the street in the same proportions; and a rental of three cents per mile per car run over the tracks on Oak street to First street, or the same rate from First street to Maryland avenue; provided, however, that the party of the first part furnish the curves, connections or special work at Maryland avenue at its own expense.

Seventh. Should the said party of the first part permit any portion of its tracks on North avenue, between the points referred to in this agreement to be used by any other company, or should it consolidate with any other company, by which its user of said tracks should be increased, such user shall not interfere with the convenient user of the same, by the party of the second part, but the schedule of cars so run on the said tracks shall be so adjusted as not to interfere with the running of the cars of the party of the second part. And should the party of the second part consolidate, connect or unite with any other line or lines, the use of the said tracks above specified shall not interfere with the use of the same by the party of the first part, but the schedule of cars so running shall be so adjusted as not to interfere with the running of the cars of the party of the first part; and the right to use the said tracks is hereby granted to said consolidated or connecting companies; and should the party of the second part permit any other company to use its poles and cross-arms between the points last hereinbefore referred to such user by said other companies shall not interfere with the convenient user of the same by the party of the first part. And in case the party of the first part should unite or consolidate with any other railway company, the right to use such poles and cross-arms is hereby granted to said united or consolidated companies.

Eighth. It is hereby mutually covenanted and agreed, that the time table or schedule for the cars of the parties hereto, shall be adjusted by the general managers or operating officers of the parties hereto, and should they fail to agree, the mayor and city commissioner shall select some expert in operating matters, whose judgment shall be final, and the expense of said expert shall be divided between the parties. It is further understood and agreed that no car shall be packed or stood upon the track between Madison avenue and Guilford avenue, and that each company shall take every means to keep from interfering with the schedule time of the cars of each other. And it is understood that the tracks are to be so laid on North avenue, near Madison avenue, where the party of the first part now has its turn-table, that the party of the second part shall not be interfered with in the use of said tracks, by reason of the stoppage of the cars of the party of the first part at said point, or by reason of

said turn-table. The road between said Madison avenue and Guilford avenue is intended to be used by the parties hereto as an electric railway, and if cars drawn by horses shall be run over said track, they shall be run so as not to unnecessarily interfere with the use of the same by the electric cars.

Ninth. It is understood and agreed that the party of the first part, hereby covenants and obligates itself to the party of the second part, that it, the said party of the second part, shall not be disturbed in the use of said tracks, and in case this contract should be abrogated by reason of preclosure of the existing mortgage executed by the party of the first part, the said one-half cost paid by said party of the second part, and that in the event of said ouster the right is reserved unto the said party of the second part to construct its own line over the territory above defined.

Tenth. The party of the first part hereby agrees to keep the said tracks, hereinbefore mentioned, in first-class condition, as an electric railway, between the points defined, and in case the said tracks shall, in the opinion of either party, require renewal or repairs and the other party shall decline to join in such renewal such question shall be submitted to the mayor and city commissioner, who shall appoint an expert, whose decision shall be final, the expense of said expert to be defrayed jointly by the parties hereto. The said Baltimore Union Passenger Railway Company does hereby constitute and appoint Eben J. D. Cross to be its attorney for it and in its name, and as and for its corporate act and deed to acknowledge this agreement before any person having authority to take such acknowledgment, to the end that the same may be duly recorded; and the said North Avenue Railroad Company of Baltimore City does hereby constitute and appoint John E. Semmes to be its attorney for it and in its name and as and for its corporate act and deed to acknowledge this agreement before any person having authority to take such acknowledgment to the intent that the same may be duly recorded.

141 As witness the corporate seal of the said Baltimore Union Passenger Railway Company and the signature of Nelson Perin, its president, the day and year first above written; and the corporate seal of the North Avenue Railway Company of Baltimore City and the signatures of William H. Whitridge, its president, the day and year first above written.

THE BALTIMORE UNION PASSENGER RAILWAY COMPANY,
[L. S.] By NELSON PERIN, *President.*
Attest: LEW FENDER, *Secretary.*

THE NORTH AVENUE RAILWAY COMPANY OF BALTIMORE CITY,
[L. S.] By WM. H. WHITRIDGE, *President.*
Attest: L. N. FREDERICK, *Secretary.*

Signed, sealed, and delivered in the presence of—
E. J. D. CROSS.
FRANCIS K. CAREY.

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

I hereby certify that on this eighth day of April, in the year 1892, before me the subscriber a justice of the peace of the State of Maryland in and for Baltimore city aforesaid, personally appeared Eben J. D. Cross, the attorney named in the foregoing agreement, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said agreement to be the act of the said Baltimore Union Passenger Railway Company; and at the same time also personally appeared John E. Semmes, the attorney named in the foregoing agreement, and by virtue and in pursuance of the authority therein conferred upon him acknowledged the said agreement to be the act of the said North Avenue Railway Company of Baltimore City.

FRANK DE S. BENZINGER, *J. P.*

I hereby certify that the foregoing is a true copy taken from the original received to be recorded among the land records of Baltimore city, April 8th, 1892, at 2.25 o'clock p. m.

In testimony whereof I hereto set my hand and affix the [L. S.] seal of the superior court of Baltimore city, this 11th day of April, A. D. 1892.

JAS. BOND,
Clerk of the Superior Court of Baltimore City.

142 PLAINTIFF'S EXHIBIT No. 6.

(Filed with the bill of complaint 30th November, 1892.)

Ordinance No. 46, of the mayor and city council of Baltimore approved April 8th, 1892, entitled "An ordinance to repeal section 2 and subsection 5 of section 4 of ordinance No. 23, approved April 8th, 1891, entitled 'An ordinance to authorize the construction of city passenger railway tracks by the North Avenue Railway Company of Baltimore City, on North avenue from McCulloh street to Guilford avenue, and thence on Guilford avenue and North street to Lexington street, and thence on Lexington street to Charles street, and on North street to the north side of Fayette street,' and to reenact the same with amendments." (*Vide* agreement as to record, &c., in this case.)

PLAINTIFF'S EXHIBIT No. 7.

(Filed with the bill of complaint 30th November, 1892.)

Being the plat referred to in the twelfth paragraph of said bill of complaint, the original whereof will be produced under the agreement hereinafter set out.

PLAINTIFF'S EXHIBIT No. 8.

(Filed with the bill of complaint November 30th, 1892.)

Being the plan of the road, as referred to in the said 12th paragraph of said bill of complaint, the original whereof under the agreement in this case, will be produced at the hearing in the court of appeals; and upon which said "plan," is the following endorsement, to wit:

"The city law officers having given it as their opinion that the Lake Roland elevated railroad, has the right under the provisions of ordinance No. 23, approved April 8th, 1801, to lay double tracks on the bed of Lexington street, between North and Calvert streets, I hereby certify that the plan set forth in this plat is, in my opinion, the least objectionable that can be adopted.

"J. G. SMYRK,
"*City Commissioner.*"

PLAINTIFF'S EXHIBIT No. 9.

(Filed with the bill of complaint 30th November, 1892.)

This is the letter dated November 7th, 1892, addressed to "James L. McLane, president Lake Roland Elevated Railway Co., by Ferdinand C. Latrobe, mayor," which is set out at large in the said bill of complaint, in the 14th paragraph thereof.

PLAINTIFF'S EXHIBIT No. 10.

(Filed with the bill of complaint 30th November, 1892.)

This is another letter dated November 7th, 1892, addressed to the president of the plaintiff by W. S. Bryan, Esq., city solicitor, which said letter is likewise set — at large in the fourteenth paragraph of said bill of complaint.

143 PLAINTIFF'S EXHIBIT No. 11.

(Filed with the bill of complaint 30th November, 1892.)

"An ordinance to regulate the use of Lexington street, between North street and Charles street, by railway tracks, and to prohibit the laying, or maintaining, or using by North Avenue Railway Company, or any other person or corporation, of more than a single iron railway track upon said portion of Lexington street;" referred to in the 15th paragraph of said bill of complaint as "ordinance No. 1, approved 18th of November, 1892." (*Vide* agreement as to the record, &c., in this cause.)

PLAINTIFF'S EXHIBIT No. 12.

(Filed with the bill of complaint 30th November, 1892.)

MAYOR'S OFFICE,
BALTIMORE, *November 21st*, 1892.

James L. McLane, Esq., president Lake Roland Elevated Railway Company.

DEAR SIR: You are hereby notified under the authority vested in me by section 2, of ordinance No. 1, approved November 18th, 1892, to remove the double tracks laid by the Lake Roland Elevated Railway Company, on Lexington street, between North and Charles streets, within ten days from this date. In case of neglect on your part, or on the part of the corporation of which you are president, to so remove such iron *railing* tracks within the time specified, it will become my duty, under the ordinance above referred to, to have the same removed.

Yours very respectfully,

A. E. SMYRK,
City Commissioner.

PLAINTIFF'S EXHIBIT No. 12 A.

(Filed with the bill of complaint 30th November, 1892.)

Ordinance No. 50, of the mayor and city council of Baltimore, approved April 18th, 1892, entitled "An ordinance to authorize the construction of city passenger railway tracks on certain streets and avenues in the city of Baltimore, by the Baltimore, Canton and Point Breeze Railway Company of Baltimore City." (*Vide* agreement as to record, &c., in this cause.)

PLAINTIFF'S EXHIBIT No. 13.

(Filed with the bill of complaint 30th November, 1892.)

Ordinance No. 102, of the mayor and city council of Baltimore, approved October 8th, 1892, entitled "An ordinance to authorize the Baltimore City Passenger Railway Company to lay tracks in certain streets." (*Vide* agreement as to record, &c., filed in this cause.)

144 PLAINTIFF'S EXHIBIT No. 14.

(Filed with the bill of complaint 30th November, 1892.)

Plat referred to in the 20th paragraph of said bill of complaint, showing the width of Gay street at the "Narrows." (*Vide* agreement as to record, &c., filed in this cause.)

PLAINTIFF'S EXHIBIT No. 15.

(Filed with the bill of complaint 30th November, 1892.)

Plat referred to in the said 20th paragraph of said bill of complaint, showing the location of the traction company's road on Lombard street. (*Vide* agreement as to record, &c., filed in this cause.)

Answer of Defendants to the Bill.

(Filed 6th December, 1892.)

In the Circuit Court of Baltimore City.

LAKE ROLAND ELEVATED RAILWAY COMPANY
vs.
MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*

Answer of the Mayor and City Council of Baltimore and of Alfred E. Smyrk, city commissioner, to the bill in this court against them exhibited by the Lake Roland Elevated Railway Company.

To the Honorable J. Upshur Dennis, judge, &c.:

These defendants answering, say:

I. That it is true that by ordinance 23, approved April 8th, 1891, the defendant, The Mayor and City Council of Baltimore, granted the privilege to the North Avenue Railway Company of Baltimore City, to lay double iron railway tracks on certain streets in Baltimore city, among other streets, upon Lexington street, between North and Charles streets, upon the conditions and limitations set forth in the ordinance. That the exact terms of the privilege or license to lay such tracks, will appear by a reference to the said ordinance. That the said ordinance did not constitute a contract between the mayor and city council of Baltimore and the North Avenue Railway Company, and did not vest in said North Avenue Railway Company any absolute right to the use of the said city, but was and is a mere license, subject to be revoked and altered whenever necessary, in the judgment of the mayor and city council, for the proper regulation of the public streets; that it was beyond the power of the then mayor and city council to barter away or dispose of the power of their successors in office, to make any regulation of the use of any of the public streets of the city by railway, or other tracks which the public safety, the public welfare, or the public convenience might require.

145 II. That it is undoubtedly true that since the passage and approval of ordinance 23 of April 8th, 1891, the North Avenue Company or the plaintiff herein has laid some tracts and erected some poles and strung some wires on the route laid out in the ordi-

nance, and has also done some of the works on the elevated structure on North street, the exact amount of this work and the amount of money invested in its adventure these respondents leave the plaintiff to prove by competent evidence if it deems the same material to this case. But these respondents aver that no portion of the road laid out under the authority of ordinance 23 of April 8th, 1891, within a mile of Lexington street, or indeed east of the tracks of the Northern Central Railway Company on North avenue, is now ready for use or has ever been used by the plaintiff as a street railway.

III. That whether when the ordinance 23 of April 8th, 1891, was before the city council, property-holders on Lexington street, between Charles and North streets, advocated its passage or failed to object to its passage, these respondents can neither admit nor deny, but leave the plaintiff to prove the same by competent evidence if it deems it material in this case — to do.

IV. That as soon as an application was made to the present mayor to approve of the location of the double iron tracks of the plaintiff on Lexington street, and his attention was called to the great public inconvenience and loss that would arise from placing double tracks there, he requested the president of the plaintiff, as stated in paragraph 12 of the bill of complaint, to lay down but a single track, and this request was refused. At this time a plat was shown to the mayor and city commissioner, which shows only the location on Lexington street between North and Calvert streets. The mayor then consulted the city solicitor, who after examining the ordinance 23 of April 8th, 1891, advised that the plaintiff had the right to lay double tracks on Lexington street, but that this authority to do so could lawfully be taken away by a proper ordinance. That this was, so far as these respondents can ascertain or recall, on the 3rd day of November, 1892. That either the next day, or the next day but one, the papers contained an interview with the mayor in which it was stated that he was opposed to the laying of two tracks on Lexington street, that he considered that it would be a great detriment to the public and that as the city solicitor had stated that the privilege given to the plaintiff to lay such double tracks could be altered and amended, he intended to advise the city counsel to restrict the plaintiff to one track; and that certainly as early as the 4th or 5th of November, 1892, it was not only well known to the officers of the plaintiff, but to the general public, that the mayor considered the laying of double tracks on Lexington street a great public detriment, and was greatly opposed to its being done, and intended to recommend to the incoming city council to restrict the plaintiff to one track on Lexington street between Calvert and North.

V. At what precise time the plaintiff began the work of laying down the double tracks on Lexington street between North and Charles these respondents cannot at this time state, but the plaintiff was engaged in the said work on the morning of November
146 7th, and had made but slight progress therein, when the mayor, suspecting that the plaintiff was endeavoring to get

the tracks down before the city council could modify or alter the ordinance 23 of April 8th, 1891, so as to have a colorable ground to pretend that it had laid the same on the faith of the permission given in said ordinance 23 of April 8th, 1891, wrote to the president of the plaintiff the letter filed with the bill as Exhibit No. 9. The same day the city solicitor wrote the letter, Exhibit No. 10, to the president of the plaintiff. Despite the warnings in these letters, the plaintiff hurried on with the work of laying down said tracks and had men at work all night Monday night, November 7th, 1892, and all day and all night Tuesday, November 8th, 1892, although the said Tuesday was election day and a public holiday; and the work was afterwards persisted in until the said rails were laid from Charles and Lexington streets to within a few feet of North street, although the pavement of the street has not yet been placed in its proper condition, nor have any of the tracks been laid on North street around the corner from Lexington street, nor has any of the work of laying them on that portion of North street been commenced. And these respondents charge that there was no proper reason, excuse or justification for rushing through the work of laying the tracks on Lexington street before the city council could convene.

VI. That when the letters, Exhibits Nos. 9 and 10, were written, it was the purpose of the mayor to merely recommend the restriction of the plaintiff to one track between North and Calvert streets, because the outrage on the public of allowing them to have two tracks is greater there than anywhere else, as two tracks interfere with and hinder the ingress and egress from engine-house No. 4, of the city fire department, and also with the mail carts of the post-office department, the post-office building being on the south side of Lexington street, between Calvert and North streets, as shown in the plat Exhibit No. 7, filed with the bill.

Further reflection and conversation with the property-holders on Lexington street, and others interested in the preservation of Lexington street for the use of the public, convinced him that the interests of the public required that but a single track should be tolerated between North and Charles streets, and for that reason the ordinance was drawn as it now appears. This ordinance was seen in the office of the city solicitor on the afternoon of either November 9th, 1892, November 10th, 1892, or November 11th, 1892—and these respondents believe it was November 11th—by the president of the plaintiff and by John E. Semmes, Esq., one of its attorneys. The ordinance was introduced into the city council on the first night of its session, November 14th, 1892, and passed at that session.

VII. It is true that the aforesaid ordinance was pressed by the mayor and city council at its first meeting and that it passed both branches that night, and while these respondents respectfully maintain that they are under no obligation to justify to this honorable court, nor to any other court, the motives actuating the city council or the propriety of its legislative action, as the city council is responsible only to its constituents for such legislative action within
147 the limits of its jurisdiction. They aver that unless the city council had passed the ordinance endorsed by both the

mayor and the city's law officers, with promptness, its members would have been strangely insensible to their duty. Prompt action was rendered imperative by the reprehensible haste with which the plaintiff was endeavoring to lay its tracks.

VIII. What was done at the meeting of the city council at which the ordinance herein attacked was passed, appears by copies of the journal of the two branches of the city council for that night, herewith filed as Defendant's Exhibit 1 and 2.

IX. Whether the use of double tracks on Lombard street, between Exchange place and Gay street, or on Charles street, between Baltimore and Saratoga streets, or on Gay street, between Jones' falls and Ches-nut street, are inconveniences to the public, whether they ought to have been permitted originally, or ought now to be removed, are not matters which are at all genuine to the real issue in this case or in regard to which it is important that the mayor and city council should receive the approbation of the plaintiff herein. If the public is being imposed upon or unfairly treated by other passenger railroads, it by no means follows that the mayor and city council are stopped from prohibiting still further encroachments on the rights of the public by this company.

As a matter of fact, however, there is no analogy whatever, between any of the cases complained of and Lexington street; Jones' falls will be bridged; the Lexington-street hill between Charles and Calvert street was cut down, and new pavements will be laid; all at an expense of almost three-quarters of a million of dollars to the city and the property-holders, to obtain an open, unobstructed thoroughfare from East Baltimore through the centre of the city to the western city limits. This great expense was undertaken in the hope of thereby relieving Baltimore street of the congested travel now upon it. This wise purpose will, in a large measure, be defeated if the plaintiff is permitted to carry out its boasts in paragraph XVII of its bill of complaint, and run cars "at a high rate of speed at intervals of two or three minutes, or sometimes of one minute apart," over Lexington street between Charles and North. If this is permitted, Lexington street will be practically useless as a driveway, and will become the private right of way of the plaintiff. The distance between the outer rail of the plaintiff's tracks as laid and the kerb varying from 6 feet 2 inches to 7 feet 6 inches, of this space 15 inches will be taken up by the overhanging sides of the plaintiff's cars, and 18 inches by the gutter, leaving only from 3 feet 5 inches to 4 feet 9 inches clear as a driveway, as appears from accompanying plat filed herewith. This is entirely too narrow a space, the ordinary buggy being 5 feet 4½ inches wide from hub to hub, the dray being 6 feet 8 inches wide from hub to hub, and the ordinary furniture or express wagon being 6 feet 5 inches wide from hub to hub. In addition to this, for a great many years past, the houses on Lexington street, between Charles and St. Paul streets, have been used for lawyers' and real-estate brokers' offices, and it has become customary for persons doing business with the tenants of such offices to have their carriages stand in front of these offices for long

periods of time. The habits of the people have accommodated
148 themselves to this custom, and to break it up by suffering the double tracks of the plaintiff to remain there, would be a public inconvenience, as well as a private hardship on the persons there doing business. Besides this, the city hall faces on Lexington street, between Holiday and North streets, the United States post office, internal revenue office and U. S. court-house in the new post-office building, No. 4 engine-house, and the office of the liquor license board, are all on Lexington street, between North and Calvert, and the city court-house and record office is on Lexington street, between St. Paul and Calvert streets; and the main entrance of the city court-house is on Lexington street. It is, therefore, essential to the public welfare and convenience that persons having business with the above-named public offices should have a reasonably available driveway by which to reach them. And still in addition to this, every thoroughfare, south of Lexington street, to the water front, is encumbered with railroad tracks, to wit: Fayette, Baltimore, German, Lombard and Pratt streets.

X. Although these respondents have thus fully set forth the reasons why it is of extreme importance to the people of Baltimore that this plaintiff shall not be permitted to appropriate Lexington street to its practically exclusive use, and why the city council were clearly right in passing the ordinance prohibiting more than a single track on Lexington street, it is yet respectfully insisted that this honorable court has no authority to inquire into the propriety of all regulations of the streets by street railways to the city council. It is not within the power of the court to substitute the judgment of any judge or judges for the judgment of the representatives of the people in council assembled.

XI. While it would probably be a pecuniary advantage to the plaintiff to have Lexington street entirely delivered over to it, these respondents believe and, therefore, charge that the amount of inconvenience which the plaintiff will suffer by the statutory restriction placed upon it by ordinance No. 1, of November 18th, 1892, is grossly magnified and exaggerated by the bill of complaint. These respondents believe and, therefore, charge that it will be perfectly possible for the plaintiff to operate its road with advantage under the ordinance 1 of November 18th, 1892, and to place the switches it may need on North street, as by that ordinance required. But if this were not so the rights and interests of the public would be paramount, and the plaintiff would have no right to complain that a legislative power subject to which its privileges were conferred, had been exercised for the public welfare.

And these respondents aver that the city commissioner has never notified the plaintiff as to what its share of any new pavement on Lexington street will be, and no permit was ever granted to the plaintiff to use a steam plow in tearing up Lexington street to lay down the double tracks, and that the averments in the bill to that effect are erroneous.

XII. These respondents require strict and full proof of each and

every allegation in the bill of complaint not herein expressly admitted.

149 XIII. Having answered as fully as they are advised is necessary or proper, these respondents pray to be hence dismissed with their reasonable costs.

WILLIAM S. BRYAN, JR.,
City Solicitor.

THOS. G. HAYES,
City Counsellor.

STATE OF MARYLAND, *City of Baltimore,* } *sct:*

Before me, the subscriber, a justice of the peace, of the State of Maryland, in and for the city of Baltimore, personally appeared on this 6th day of December, 1892, Ferdinand C. Latrobe, mayor of Baltimore, and Alfred E. Smyrk, city commissioner, and made oath in due form of law that the matters and facts above stated, so far as they be within the knowledge of the respective affiants, are true and that so far as they are stated from information, they are believed to be true.

JOHN J. GRINDALL, *J. P.*

DEFENDANT'S EXHIBIT No. 1.

(Filed with the above answer December 6th, 1892.)

1st day.

Journal, second branch.

MONDAY, *November* 14*th*, 1892.

This being the day, under the act of the General Assembly of Maryland, 1888, chapter 397, section 5, on which the respective branches of the city council of Baltimore are required to meet in annual session, the following members (John M. Jones, Esq., president, in the chair), appeared in their seats, viz: President, Brown, Murphy, Shaw, Sutherland, Mahon, Supplee, Leonard, Cullen and Brannan.

Received also an ordinance entitled "An ordinance to regulate the use of Lexington street between North street and Charles street, by railway tracks, and to prohibit the laying or maintaining or using by the North Avenue Railway Company, or any other person or corporation, of more than a single iron railway track upon said portion of Lexington street," with accompanying communication of his honor, the mayor, recommending the passage of the ordinance, which were read.

On motion of Mr. Supplee the ordinance was read a second time, by special order, the title read and approved, and the ordinance declared passed. * * *

On motion of Mr. Brown, the branch adjourned until Monday, January 23rd, 1893.

By order,

JOHN M. TRAVERS, *Clerk.*

150 DEFENDANT'S EXHIBIT No. 2.

(Filed with the above answer December 6th, 1892.)

1st day.

Journal first branch.

MONDAY, *November* 14*th*, 1892.

This being the day, under the act of the General Assembly of Maryland, of 1888, chapter 397, section 5, in which the city council of Baltimore is required to meet in annual session, the following-named gentlemen, members-elect, after having first duly qualified before his honor, the mayor, at 5 o'clock p. m., and took their respective seats:

1st	ward,	Hanson P. Barnes,	12th	ward,	Jasper M. Berry,
2d	"	Henry Manken,	13th	"	Joseph E. Schleifer,
3d	"	John H. Windfelder,	14th	"	John T. Fahey,
4th	"	Adam Deupert,	15th	"	Edwin C. Snyder,
5th	"	Walter H. Stewart,	16th	"	Charles W. Brain,
6th	"	Lawrence Rigger,	17th	"	Joseph Gehring,
7th	"	James B. Guyton,	18th	"	Frederick Spindler,
8th	"	John F. Doyle,	19th	"	William J. Ogden,
9th	"	John F. Leonard,	20th	"	Martin B. Brown,
10th	"	Henry Seim,	21st	"	Charles T. Turner,
11th	"	G. W. H. Craig,	22d	"	James H. Smith.

The president also presented the following communication from his honor, the mayor, covering the annexed ordinance, which *were* read:

MAYOR'S OFFICE, BALTIMORE, *November* 14*th*, 1892.

To the honorable the members of the city council.

GENTLEMEN: I send herewith an ordinance repealing so much of an ordinance approved April 8th, 1891, as authorizes the North Avenue Electric Railway Company, now known as the Lake Roland Elevated Railroad Company, to lay double tracks on Lexington street, between North and Charles streets. Although the powers conferred by the ordinance have since apparently been ratified by an act of assembly of 1892, chapter 112, approved March 17th, I am advised by the city solicitor that such power of repeal exists in the city council; if this is so, I think it should be exercised.

I am in favor of rapid transit, and believe that the change in motive from horse power to the cable and electricity will greatly benefit this community. At the same time I think that some consideration should be given to the rights and privileges of those who use the streets with horse vehicles; in other words, that only single tracks should be laid on those business thoroughfares which are not of sufficient width to accommodate double tracks without greatly inconveniencing the public.

In other cities where the thoroughfares are narrow, the railroads are compelled to use parallel streets for their up and down traffic.

151 After paying nearly six hundred thousand dollars to open Douglas streets as an east and west thoroughfare, we find that three squares of the street; that is from North to Charles, will be almost blockaded by the double tracks of this railroad company.

This matter, in my judgment, demands the immediate attention and consideration of your honorable body.

Provision should also at once be made for constructing a new bridge over the falls on the line of Baltimore street. This is required by the widening of the Baltimore street "narrows."

I direct your attention to this matter, in order that the cabling of the City Passenger Railroad Company on our main thoroughfare may not be unnecessarily delayed. Plans and specifications have been prepared in the city commissioner's office, and an ordinance will be submitted, authorizing the work to be promptly proceeded with. It is proposed to carefully store the material in the old bridge so that it may be utilized in some other locality.

Yours very respectfully,

FERDINAND C. LATROBE, *Mayor.*

An ordinance to regulate the use of Lexington street, between North street and Charles street, by railway tracks, and to prohibit the laying, or maintaining, or using by North Avenue Railway Company, or any other person or corporation, of more than a single iron railway track upon said portion of Lexington street. * * *

On motion of Mr. Doyle the ordinance was read a second time, by special order, the title read and approved, and the ordinance declared passed. * * *

On motion of Mr. Windfelder, the branch adjourned until Monday, January 23rd, 1893, at 5 o'clock p. m.

By order,

JOHN KELLY, *Clerk.*

DEFENDANT'S EXHIBIT No. 3.

(Filed with the above answer December 6th, 1892.)

The plat referred to in the 8th paragraph of said answer. (*Vide* agreement as to record, &c., filed in this cause.)

Petition and Order to Take Testimony.

(Filed 9th December, 1892.)

In the Circuit Court of Baltimore City.

LAKE ROLAND ELEVATED RAILWAY COMPANY
vs.
MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*

To the Honorable J. Upshur Dennis, judge, &c.

The petition of the Lake Roland Elevated Railway Company, in this case respectfully shows that it desires to take testimony
152 in this case, and respectfully prays that leave be granted it to do so before one of the standing examiners of this court, to be used at the hearing of the motion for a preliminary injunction.

BERNARD CARTER,
WM. A. FISHER,
STEELE, SEMMES & CAREY,
Solicitor- for Complainants.

In the Circuit Court of Baltimore City.

Ordered this eighth day of December, 1892, that leave be granted to the parties to the cause, to take testimony as prayed, before any one of the standing examiners of this court, and that the commissioner be and he is hereby directed to make a return of the testimony taken on or before the 19th of December, 1892.

J. UPSHUR DENNIS.

Testimony Before the Examiner.

(Filed 30th December, 1892.)

In the Circuit Court of Baltimore City.

THE LAKE ROLAND ELEVATED RAILWAY COMPANY
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*

The above cause being at issue, and notice having been given me by the solicitors of the plaintiff of a desire to take testimony in the same (leave of court having been first obtained), I, J. Glenn Pitts, one of the standing examiners of the circuit court of Baltimore city, duly appointed, qualified and sworn, met on the 9th day of December, A. D. 1892, at my office, No. 10 E. Lexington street, in the city of Baltimore, in the State of Maryland, and assigned the 10th day of December in the same year, at three o'clock in the afternoon, and the office of Messrs. Steele, Semmes & Carey, as time and place for

the examination of witnesses in said cause; at which last-mentioned time and place I attended, having given due notice of such meeting, and proceeded in the presence of the solicitors of the respective parties, to take the following depositions; that is to say:

LAKE ROLAND ELEVATED RAILWAY COMPANY
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*

JOSEPH P. SMITH, a witness of lawful age, produced on behalf of the complainants, being duly sworn on the Holy Evangely of Almighty God, deposes and says as follows:

153 Direct examination.

By the EXAMINER:

1 Q. Please state your name, age, residence and occupation?

A. Joseph P. Smith; I am 41 years of age, and am general manager of the Lake Roland Elevated Railway Company; I reside in Baltimore city.

2 Q. Do you know the parties to this suit or either of them?

A. I know the parties to this suit.

Mr. CARTER:

3 Q. What connection have you with the plaintiff in this case?

A. I am general manager of the company.

4 Q. Please state how much of the railway of the plaintiff had been constructed and what was the condition of the remainder of the work upon the 1st of November last?

A. I should say eight-tenths of it had been constructed.

5 Q. Please describe the route of the railway of the plaintiff, beginning your description at the corner of Charles and Lexington streets.

A. Starting from the corner of Lexington and Charles streets, the route runs down Lexington St. to North St., and from North St. to North Ave., and out North Ave. to Walbrook; then from Oak St. to the other division of the road to the terminus at Roland park.

6 Q. Please state between what points the eight-tenths of the work which you have mentioned has been constructed?

A. Between Charles St. and North St. on Lexington St., and a portion of our elevated structure is now in position on North St. between Lexington St. and North Ave. The route is completed from the intersection of Guilford Ave. or North St. to Walbrook. Then on Oak St. our circuit is complete. The entire part of that street we operate over, and four-fifths of the balance of the route is completed between that point and Roland park, including the Viaduct bridge. Then of our buildings the power station is completed, and I should say four-fifths or five-sixths of the car-house is completed. Foundations for our machinery are nearly completed. All our electric equipment is here in the way of rolling stock and electric motors, and a good portion of our

steam plant, comprising engines, boilers, &c., are now being erected at the power station. Our circuits, including pole lines, trolley wires, &c., are nearly all complete.

7 Q. So far as the road has been constructed has it been constructed as a double-track road?

A. The entire road, with the exception of about one and one-half miles in Walbrook, is a double-track construction, with the terminus of the Walbrook division double track.

8 Q. What experience have you had, before coming to Baltimore, in the construction and operation of electric passenger railways?

A. Prior to my coming here I was associated with the manufacturers of electric railroad equipments, and have constructed
154 roads for them at different points, and have been associated with the management in the operation of roads for four years.

Q. 9. Please state whether you had charge of the construction, for the plaintiff, of the tracks which have — constructed on Lexington St., between North and Charles streets.

A. I did.

10 Q. What communication did you have with the city commissioner before you began that work, and in this connection state the reasons for your beginning to work on Lexington St. at the time you did begin it?

A. About the 1st of November I wrote a letter to the city commissioner stating that we were now ready to commence track-laying on the different streets covered by ordinance, and two days later I called at his office and inquired if it would be necessary for me to have his approval before our commencing to lay tracks. He stated that since receiving my communication he had referred to the city ordinances and was aware that we had provision to lay tracks over the streets designated, and it would not be necessary for me to have his written approval, but that we had the privilege of commencing work. We commenced laying track at the corner of Merryman's lane and Roland park, and after our track-layers had got well started with their work we learned through the engineer, Mr. Filbert. I think is his name, who has a contract to pave the block in front of the post-office building, on Lexington St., with asphalt, that he was to commence in a few days with the work, and that if we desired to put down our tracks on this street before the asphalt was put down we would have to commence at once. I immediately notified the superintendent of track-laying of this fact and requested that he immediately commence work on Lexington St. Not more than two days later work was commenced on Lexington St., and the track-laying crew worked up to noon, when we were notified by the city commissioner that it might be necessary for us to make some changes in the laying of the track in this block in front of the post-office building. The city commissioner called at our office, with Mr. Duvall, and we had a conversation regarding the matter, and an appointment was made for the next day at the city commissioner's office for the purpose of considering or talking over any change in the original plan that might be thought preferable to the

former plan, owing to the number of manholes that had recently been placed in Lexington St. for the use of the post-office department and the Chesapeake & Potomac Telephone Company. We called on the city commissioner and with him examined the new plans that Mr. Duvall had prepared with our draughtsman, such as would permit of the tracks being laid without interfering with the manholes. The city commissioner, Mr. Duvall, and engineer Frederick H. Smith, examined the plans and it was thought best to have the two tracks in front of the post office moved to the side of the street next to the post office, changing them from their original location, thus permitting wagons and teams to travel on the opposite side of the track with less interruption than they would if the two tracks were in the middle of the street. Before, however, giving us authority to place the tracks in this posi-
155 tion, the city commissioner, desiring to submit the plans to the mayor, an appointment was made for two days later to meet the mayor for the purpose of inspecting the plan. At the time appointed the city commissioner——

Mr. BRYAN: You cannot give us the date of that, can you?

A. I could find it, but I cannot now give it to you. At the time appointed, the city commissioner, with Mr. Duvall, Mr. McLane and myself called at the mayor's office and showed him the plans, which, after examination, he agreed to be located in the best position and such as would inconvenience travel the least, provided the tracks were to be laid on this street. I think two days later the plans, which were exhibited at this meeting, were approved by the city commissioner, and to expedite the work and inconvenience the public as little as possible, we secured permission from the mayor to use steam power on this street with which to remove the cobble pavement in position and lay the tracks. Track-laying commenced on election day, the 8th of November, and was continued up to the time of the completion of the work, with the exception of some special work that is required at the intersection of Calvert and Lexington streets.

Mr. CARTER: Please look at the paper now shown you, marked Plaintiff's Exhibit No. 7, and also at Plaintiff's Exhibit No. 8, and state whether Exhibit No. 8 shows the location of the tracks of the plaintiff between North and Calvert streets, as they have been constructed, and whether that exhibit shows the tracks in the location which you have said the mayor and city commissioner approved of as a location less inconvenient than any other for the tracks between those two streets.

A. The location as shown on this plan appears to be a duplicate of the one exhibited in the presence of the mayor and approved by the city commissioner, and shows the way in which the tracks have been actually constructed.

13 Q. Was that blue print made in your office?

A. I could not say whether it was or not.

14 Q. I understood you also to testify that the location of the tracks of the plaintiff, the whole distance on Lexington street, to wit, from Charles to North streets, was also shown on a plat to the

city commissioner and the mayor, and that the location of the tracks between Calvert and Charles streets as then shown and exhibited, was also approved by the city commissioner. Do I understand you correctly?

A. That was my understanding.

15 Q. Will you please look at Plaintiff's Exhibit No. 7, and state whether it is a copy of the plat or plan showing the location of the tracks of the plaintiff, as they have actually been constructed from North street to Charles street?

A. Yes, sir; this is the plan by which the tracks were constructed and now are in position.

16 Q. Is Plaintiff's Exhibit No. 7 a copy of the plan and location of the railway, as shown to the mayor and city commissioner at the times you have spoken of?

A. Yes, sir.

156 17 Q. You have stated that you have obtained from the city a permit to use steam apparatus on Lexington street for the purpose of removing the cobblestones and earth. Please look at the paper now shown you, marked Plaintiff's Exhibit Examiner Oster, and state whether that is the permit of which you spoke? (Handing paper to witness.)

A. Yes, sir; this is the permit.

18 Q. Was that permit issued before or after the change of location of the tracks between North and Calvert streets had been suggested by the mayor and city commissioner and agreed to by you on behalf of the plaintiff?

A. The permit was issued afterward.

19 Q. Had you begun work on Lexington street before the interview with the city commissioner, which resulted in your agreeing, at his suggestion and that of the mayor, to change the location of the tracks between North and Calvert streets?

A. Yes, sir; we had.

20 Q. Can you remember how many days before the issue of the permit, contained in Plaintiff's Exhibit Examiner Oster, you had begun the work?

A. I think we began the work between the 1st and the 3rd of the month.

21 Q. What, if anything, did the city commissioner do in person, or through his assistants, in the way of correcting or ascertaining for you the grade of Lexington street between the points named?

A. On the 7th of November, I sent our draughtsman to the city commissioner to ascertain whether the grades and levels, between Calvert and Charles streets, were situated as he desired to have us maintain them in laying our tracks. The city commissioner, through his deputies, gave new levels and grades, and stakes were set under the direction of the deputies of the city commissioner on the morning of the 8th of November, before track-laying commenced on Lexington street between Calvert and Charles street.

22 Q. Did you conform to those directions as to grades thus indicated?

A. Yes, sir; we conformed to the grades given, which necessitated

our repaving Lexington street on the south side for about 140 feet from Charles street towards Calvert street.

23 Q. Did you continue track-laying on the 8th, which was election day, and if so, why did you do so?

A. On ordinary business days Lexington street is very much crowded with teams, and desiring to do the track-laying with as little interruption as possible, we selected this day to do the work when there was little, if any, traffic.

24 Q. Were you engaged in the construction of the track on Lexington street on the 7th of November also?

A. We commenced tearing up the cobble pavement with the steam power, to use which we had been granted permission by the mayor, after 7 o'clock on the evening of the 7th.

157 25 Q. Did you work during the night of the 7th?

A. Yes, sir.

26 Q. You have given as a reason why you continued to work on election day that the street was less used on that day than on other days, and you also spoke of the traffic on this street on other days. What did you observe as to the principal use that is made of Lexington street by vehicles?

A. The main occupation of the street between Calvert and Charles streets is by buggies, teams and wagons that are hitched on each side of the street.

27 Q. You have stated that you have been in Baltimore only some sixty days. I will not ask you, therefore, as to your knowledge of what are the chief thoroughfares in the city, but assuming that Charles street is one of the main thoroughfares, which it is desired that the plaintiff should have access to, I will ask you, as you have stated that you have had experience in operating electric railways, and assuming the distance on Lexington street from North street to Charles street to be about 1,100 ft.; will you state what length of time, under ordinary circumstances, and looking to the ordinary condition of Lexington street, would it require for an electric car to go from the corner of North and Lexington streets up to the corner of Charles and Lexington streets, unload its passengers, make the requisite changes for it to start on its return trip, and get back to the corner of North and Lexington streets?

Question objected to.

A. Providing the car had no extraordinary interruption it should cover that ground and make those changes in from six to seven minutes, but if each car is inspected, as it is customary to make inspection at each terminus of the line after making a run of six or seven miles, it would take at least from two to three minutes additional time.

28 Q. Please state the elements and the calculation by which you arrive at the result of six or seven minutes for the route which I have described in the last question?

Question objected to.

A. In going through this portion of the city, where cars are in-

terrupted more or less by buggies, and furthermore by the crossing twice of the competing line at the intersection of Calvert and Lexington streets, we could not expect to operate our cars at a greater speed than from three to four miles per hour. Then at the terminus of the road, at the intersection of Charles and Lexington streets, there would have to be a delay to permit passengers to leave the car and passengers desiring to go out on the road to get in the car. Then again, there would be the time lost in changing the trolleys, which would be necessary when changing the direction of the car. Then in the evening there would have to be the extra time lost in changing the headlight from one end of the car to the other.

29 Q. Assuming that your opinion is well founded, as expressed in the answers to the two last preceding questions, what
158 is the best schedule that would be reasonably practicable for the operation of the plaintiff's road, assuming its terminus in the centre of the city to be at the corner of Charles and Lexington streets, with a single track on Lexington street from North street to Charles street?

Question objected to.

A. From eight to ten minutes.

30 Q. You have mentioned that on Lexington street the tracks of the plaintiff's road cross a competing line at the corner of Calvert and Lexington streets. What line is that and what kind of power is it about to use for propelling its cars?

A. I know this line as the Bowie line, and at an early day that road will be operated by cable power.

31 Q. You have stated that with a single track on Lexington street the best schedule that would be reasonably practicable for the operation of the road would be one of eight to ten minutes. Do you mean by that that this would be the interval to lapse between the starting from the corner of Lexington and Charles streets of each car, or what do you mean?

A. I mean that the road could not be operated at this terminus at a better schedule between the different cars than from eight to ten minutes.

32 Q. Suppose that there is a double track on Lexington street, from North to Charles, and as you have stated there are to be double tracks on North street, please state what would be the best schedule reasonably practicable in this condition of things?

Question objected to.

A. With double tracks on Lexington street we would be able to operate cars on a schedule of two minutes, or on the same schedule used by the traction company on Fayette street.

33 Q. Is there a line of railway tracks now operated on Charles street from below Baltimore street up to and beyond Lexington street?

A. There is.

34 Q. Are you familiar with the route of that line of cars between Lexington street and North avenue?

Question objected to.

A. I am not familiar with the circuit that the cars make in reaching the northern part of Charles street, but know that the cars on this road run from Lexington and Charles streets to North avenue, nearly parallel with our line on North street.

35 Q. Is the route of the Bowie line on Calvert street parallel with the route of your road?

A. Yes, sir.

36 Q. Supposing that the company which owns the Charles-street route which you have mentioned is about to use electricity for its cars, and taking into consideration the fact that you have
159 stated that the line on Calvert street, belonging to the Bowie Company is to be propelled by cable, and that both of those lines have double tracks of railway on their entire route, what in your judgment would be the effect on the travel by your road if you were limited to a schedule of seven or eight minutes between your cars?

Objected to as surmise.

A. It would, in my judgment, divert two-thirds of the travel we would receive without double tracks, to these two different competing roads.

37 Q. Suppose that your company, in its operations, brought all of its cars to the terminus at the corner of Lexington and Charles streets, and that you had but a single track on Lexington to operate with, and that your schedule on Lexington street with this single track was what you stated would be, what would your schedule have to be on your double track on North street?

Objected to as surmise.

A. The entire schedule of the road would have to be governed by the eight or ten minutes' schedule, such as this single track on Lexington street would confine us to.

Cross-examination.

(Mr. BRYAN:)

1 X Q. How far east of McCulloh street do you now operate your cars on North avenue?

A. I am not familiar with the location of probably more than a half a dozen streets in the city. I could not tell you where McCulloh street is.

2 X Q. You had the right prior to the passage of ordinance No. 23, of April, 1891, to operate your cars from Walbrook to the corner of McCulloh street and North avenue, did you not?

A. I do not know.

3 X Q. You do know, though, do you not, that your cars have never been operated east of the Northern Central railway tracks on North avenue, which is but two squares east of McCulloh?

A. Not to my knowledge.

4 X Q. You know, as a matter of fact, it never has been done, do you not?

A. No, sir, I do not know it as a matter of fact. Our circuit runs over there, and whether the cars run over there or not, I do not know.

5 X Q. You do not wish the court to understand that you are in any doubt as to the fact that the North Avenue Company, or its successor, the Lake Roland Elevated Railway Company, has ever ran a car with passengers in it over the North-avenue bridge, do you?

A. I do not know anything about it. Since I came to the city the terminus has been at McMechen street, opposite Ditch's stable.

6 X Q. Is there any other place between the corner of McCulloh street and North avenue, and the corner of Charles and Lex-
160 ington street, except on Lexington street, between Charles and North streets, where your work has been done during the night?

A. You mean the constructing work?

7 X Q. Yes.

A. I do not know that there ever has been any construction work done in this city by this company at night excepting what I did on Lexington street.

8 X Q. Have you any rails on North street, between Saratoga and Lexington streets, laid, or in preparation of being laid?

A. No, sir.

9 X Q. Have you laid switches and turns from Lexington street around the corner into North street?

A. No, sir; they have not been laid.

10 X Q. Your track has not yet been laid to the corner of Lexington and North streets, has it? I mean it now stops some feet west of the North-street line, is not that so?

A. Just where the curve commences.

11 X Q. You do not wish to be understood as testifying that your work was not hurried up because your company knew that the mayor would recommend to the city council the passage of an ordinance restricting them to the use of one track on Lexington street?

A. Our track-laying on Lexington street was not completed earlier than the 15th of November; 15 days after we commenced laying the track.

12 X Q. But you do not wish to be understood as stating that your road did not endeavor to have the tracks laid before the city council could meet on the 14th of November, do you?

A. I had charge of the placing of these tracks in position, and I had no knowledge as to whether the council would meet or would not meet. I did not know anything about it.

13 X Q. Then, are we to understand that your work was not expedited at all because there was an apprehension that if the council met they might restrict your road to the use of one track?

A. No, sir; not in the least.

14 X Q. Your work, then, was done in the same manner and at

the same rate of speed that it would have been done if the question of a single track on Lexington street had never been agitated?

A. Just the same, sir.

15 X Q. Who was present besides yourself when Captain Smyrk told you that it was not necessary for your plans to have the written approval of the city commissioner?

A. I do not remember of any one being present.

16 X Q. No one, then, was present except Capt. Smyrk and yourself?

A. No, sir.

161 17 X Q. What is the name of the engineer of Mr. Filbert who told you that you would have to hurry up your tracks if you wanted to have them ready before the asphalt was put there?

A. The representative of Mr. Filbert did not tell me; he said it to one of my office men, Mr. Deffendorfer.

18 X Q. Then, when you stated that Mr. Filbert's man told you that, you meant that he told somebody else in your employ and that person told you?

A. That is what I stated.

19 X Q. Who is Mr. Duvall, whose plan you spoke of?

A. He is assistant city commissioner. That is the gentleman who had the locating of the manholes that I referred to in my testimony as having been placed in Lexington street.

20 X Q. Can you give us now the date when you actually commenced to lay tracks on Lexington street?

A. Between November 1st and November 3d, if my recollection serves me right.

21 X Q. You cannot tell which day it was?

A. It might have been on the 28th or 29th or 30th of October.

22 X Q. I do not mean when you commenced to confer with the city commissioner, or even when you commenced to break up the pavement; but when did you commence to lay the double tracks?

A. We commenced to lay the double tracks immediately after that blue print was approved by the city commissioner locating the tracks in their present position.

23 X Q. You spoke of having secured a permit from the mayor to use the steam engine. Was that hearsay, or do you mean to testify that you yourself had an interview with the mayor?

A. The superintendent of our construction told me——

24 X Q. I do not want what the superintendent told you, but I want to know whether when you were testifying to that approval of the mayor, you were stating a matter in your knowledge or a matter of hearsay?

A. I sent one of my men after it, and he got it, and that is all I know about it.

25 X Q. You have no personal knowledge of any action of the mayor in the premises?

A. No, sir.

26 X Q. Have you any personal knowledge of Capt. Smyrk's having said that his written approval was not necessary, or did one of your men tell you that?

A. Mr. Smyrk told me that personally.

27 X Q. Have you ever had an interview with Mayor Latrobe about this matter?

A. No, sir. About what matter do you——

28 X Q. The Lexington-street tracks.

A. I was present at this meeting, where the city commissioners submitted the plans that he and Mr. Duvall, an assistant of
162 the city commissioner, and Frederick Smith prepared. They said to me that they thought this arrangement which was represented in this blue print was the best, but before giving me permission to commence the work again they wanted the approval of the mayor. The mayor was then out of the city, but returned the next day, and so we met him the second day afterward.

29 X Q. And you did have that single interview with the mayor?

A. I was present at this meeting.

30 X Q. And that is the only interview you ever had with the mayor?

A. In regard to this matter; yes, sir.

31 X Q. You never saw him except on the one occasion when Capt. Smyrk wrote his approval upon the paper of which this blue print is a copy?

A. Regarding this particular matter I only had the one interview.

32 X Q. Then you do not know of your own knowledge, do you, whether any plan was ever shown to the mayor of your tracks, between Charles and North streets, on Lexington St.?

A. This plan was presented covering the entire street, if my recollection serves me right.

33 X Q. Is this a true copy of the paper of which it professes to be a copy? (Handing Plaintiff's Exhibit No. 8 to witness.)

A. It is a longer paper than this. The copy that we presented, if my recollection serves me, extend- to Charles street, whereas this is broken off.

34 X Q. You do not know, though, of your own knowledge, and you cannot state positively that Mayor Latrobe ever had his attention called to the location of any other portion of your road except upon Lexington street between North and Calvert streets upon the day that Captain Smyrk wrote the approval, as you call it, of this plan. Is that so?

A. No, sir; there was no reference made to this part that extends from Calvert street up to Charles street in the conversation. We simply talked about the double tracks and the desire to have these tracks so laid that the *B*oint Breeze Company, when they constructed their road, could have the use of these two tracks, and so, with a reasonable curve, could get around the corner of Calvert and Lexington streets up to where about the monument is.

35 X Q. You do not know, do you, of Plaintiff's Exhibit No. 7 ever having been shown to the mayor of your own knowledge?

A. No, sir.

36 X Q. You spoke of the city commissioner having new levels made to enable your road to be built at a proper grade. Were you

speaking then of matters within your own knowledge, or of matters about which you were informed by other persons?

A. I stated that the deputies of the city commissioner had these new points and levels located, and I know that the work was delayed a couple of hours on election day in getting them.

163 37 X Q. You never yourself had any personal conversation with the mayor about the steam plough?

A. No, sir.

38 X Q. If your road is permitted to run two tracks from Charles street to North street, I understand that you expect to make your schedule time about two minutes between those streets; that it would take a car under normal conditions two minutes to run over the 1,100 feet from Charles street to North street on Lexington street?

A. I mean one car would follow the other at two-minute intervals. We should run at one-minute intervals provided our competitors did.

39 X Q. How long would it take one of your cars, do you suppose, under the schedule that you purpose to adopt, to run from Charles street to North street on Lexington street, down grade?

A. It would run at the same speed as it did the other way.

40 X Q. How long would that be?

A. From three to four minutes.

41 X Q. You said that if you had but a single track on Lexington street that you would have to run your cars on a seven or eight minute schedule, did you not?

A. Six to eight minutes; I think, I said.

42 X Q. And you gave as one of the reasons why you would have to use that longer schedule, that after the car got to the corner of Charles and Lexington streets there would have to be an interval of time within which to change the trolley, and in which to give an opportunity for the passengers to get out and new passengers to get in the car, and in which the car could be inspected, and in the night-time in which to change the headlight. That is so, is it not?

A. Yes, sir.

43 X Q. If you had a switch at the corner of Charles and Lexington streets, running down Lexington street for a distance of say 50 feet, could you not so arrange it that the moment a car ran in, another car in waiting there would have the trolleys fixed, and the passengers in, and at night the headlight arranged, so as immediately to start out?

A. Yes, sir; but they could not pass each other on the block between Calvert and North streets, where there would be but one track.

44 X Q. You were in error then in supposing that if you had the privilege of having the switch there that you would be delayed at that point during the time it was necessary to change the trolley and headlight, and examine your car, and change your passengers?

A. No, sir.

45 X Q. Am I to understand, then, that you say that with a switch at the corner of Charles and Lexington streets you could not start a car out the moment the other car went past the track where the other car was?

A. You have to switch the trolley.

164 46 X Q. You could not switch the trolley on the incoming car then after the outgoing car had left?

A. It takes time. There would be no benefit derived from having a switch at that point.

47 X Q. No benefit whatever?

A. None to speak of.

48 X Q. And you could run your cars with as little inconvenience if you ran on a single track only from North street to Charles street, as you could if you ran on a single track up to within 50 feet of Charles street and there put in a switch. Is that so?

A. Just about the same.

49 X Q. You are now building your elevated structure on North street, are you not?

A. Yes, sir.

50 X Q. On what part of North street?

A. On the north end of the elevated structure near Eager street.

51 X Q. Are you working men day and night on that structure?

A. They are working extra hours. I could not say how much extra hours.

52 X Q. Is there any single instance where the men have worked all night on that structure?

A. They have not worked all night, and the only reason they did not, was because the electric current from all those companies prevented them from doing so.

53 X Q. And you are still of opinion that your work was not quickened in the slightest, from the fact that the newspapers stated that the mayor intended to ask the city council to restrict your road to the use of one track on Lexington street?

A. I misunderstood you in regard to the work on North street. We have been working night and day in putting in our foundations there for the purpose of not inconveniencing travel. Since the very start, where travel would be a good deal interrupted by working in the daytime, we have worked at night.

54 X Q. Suppose you had your main terminus at the corner of Lexington and North streets, or at the corner of North and Fayette streets, whichever you chose, you could then run your cars on a schedule of one, two or three minutes, as you saw fit; could you not?

A. Yes, sir.

55 X Q. And it is perfectly feasible to have a single car running from North street to Calvert street, or from the main station down there, just as a single car runs today on Boundary avenue from Charles street to the York road and connecting with Mr. Perin's line?

A. You mean to have a terminus where?

56 X Q. To have a terminus down there at Lexington and

165 North streets, and run a single car up and down Lexington

street, between North and Charles streets, so that any person on Lexington street could get in the car and ride down there to the terminus, or from the terminus down there up to Charles street?

A. We could only run one branch of the road up there, and then delay would be occasioned in the taking of through passengers, and there would be the holding of the car that went through for the passengers coming over the branch of the road that only went as far as that corner. There would also be the delay of changing passengers going the other way from the terminus.

57 X Q. If you did not have to hold them there, would there be any physical difficulty in running the car down there and letting the people take the first car that came along?

A. No, sir; there would be no difficulty if you had any customers for that sort of arrangement.

58 X Q. Do you mean to say if your road were to run from Walbrook to the corner of Fayette and North streets, or the corner of Lexington and North streets, covering this other distance from North street to the corner of Charles and Lexington street with a single car, that you would not have any customers?

A. We would have customers from the extreme points, but we would not have customers from points, for instance, between points where the traction company cars cross North avenue and comes into the heart of the city, and where the Perin line runs out to Roland avenue, and comes into the heart of the city. Neither would we have customers where the Bowie line runs from North avenue down to Lexington street.

59 X Q. How are you able to say that with absolute certainty?

A. Well, that is the way I would ride if I were patronizing a road.

60 X Q. That is not a mere matter of opinion then on your part?

A. No.

Redirect examination.

(Mr. CARTER:)

1 Re-D. Q. It is stated in the 5th paragraph of the answer of the city, referring to the work that you have done on Lexington street, that the pavement has not been placed in its proper condition on Lexington street. Now, please state why you have not put the pavement in its normal condition on Lexington street between North and Calvert streets?

A. It was understood that this street is not to be paved with the same character of pavement that we took up. Mr. Filbert hauled off the cobble stones and they are in his possession. He took the pavement up.

2 Re-D. Q. This is the portion which you have already mentioned, is it not, that is to be repaved with asphalt?

A. Yes, sir.

3 Re-D. Q. When did Mr. Filbert haul those stones away?

A. Hauled them away at the time that the construction of the work commenced on this part of the street.

166 4 Re-D. Q. Has Lexington street, between Calvert and Charles streets been repaved by you, and is now traveled over?

A. Yes, sir.

Mr. BRYAN: You say it was understood that the portion of the street you name was to be repaved. Understood by you and who else?

A. By us and the party who was to put down the asphalt pavement, Mr. Filbert.

General question by the examiner:

Do you know, or can you state, any other matter or thing that may be of benefit or advantage to the parties to this suit, or either of them, or that may be material to the subject of this your examination, or the matters in question between the parties? If yea, state the same fully and at large in your answer.

A. No, sir.

The signing of his depositions is signed by this witness by agreement of the solicitors for the respective parties.

Adjourned to Tuesday, Dec. 13, 3.30 p. m.

The taking of the testimony was then adjourned to the 13th day of December, 1892, at 3.30 p. m., and same place, at which last-mentioned time and place I attended for the examination of witnesses, due notice of such meeting having been given, and in the presence of the solicitors for the respective parties, I proceeded to take the following depositions, that is to say:

JOSEPH T. BRITTAIN: a witness of lawful age, produced on behalf of the plaintiff, being duly sworn on the Holy Evangely of Almighty God, deposes and says, as follows:

Direct examination.

By the EXAMINER:

1 Q. State your name, age, residence and occupation?

A. Joseph T. Brittain; 420 N. Green street; civil engineer.

2 Q. Do you know the parties to this suit?

A. Yes, sir.

Mr. CARTER:

3 Q. What connection had you on the 2nd of *of* November, 1892, with the construction work of the plaintiff's railway?

A. Well, one of the engineer corps and inspector of masonry for them.

4 Q. Please look at the paper now shown you, marked Plaintiff's Exhibit Examiner Oster, and state what you know in reference to the issuing of that paper?

WITNESS: Do you want me to give the whole history of it?

Mr. CARTER: Yes, sir.

A. Well, Mr. Kingsley, the contractor for laying the rails on Lexington street, asked me if I thought it was necessary to have a permit to put a boiler on the street—to erect a boiler for a
167 steam plow. I told him that I was conversant with the city ordinance in a number of cases, and that it required a permit for the erection of any boiler within the city limits. He then asked me if I would go to the city hall and procure for him the necessary permit. I said I would, and I went to see Mr. Smyrk, the city commissioner. Mr. Smyrk said that that was a city ordinance, and that I had better see the chief of police. I went then to see Mr. Frey; Mr. Frey s—— me back to Mr. Smyrk, stating that Mr. Smyrk had charge of the streets, and that I had better go and see him. I went and had another consultation with him, and he said that Mr. Oster was the superintendent of buildings and he had all boilers in his charge. I went to see Mr. Oster, and explained what we wanted, and Mr. Oster said: "Well, we will go up and see the mayor." I accompanied Mr. Oster to the mayor and explained what we wanted, and Mr. Latrobe told Mr. Oster to issue the permit. I went down to Mr. Oster's office and that permit was issued and handed to me in that shape. (Referring to Plaintiff's Exhibit Examiner Oster.)

Mr. CARTER: That is all we want of Mr. Brittain.
Mr. BRYAN: I have no questions to ask him.

Cross-examination waived.

General question by the EXAMINER:

Do you know, or can you state, any other matter or thing that may be of benefit or advantage to the parties to this suit or either of them, or that may be material to the subject of this, your examination or the matters in question between the parties; if yea, state the same fully and at large in your answer?

A. No, sir.

The signing of his depositions by this witness is waived by agreement of the solicitors for the respective parties.

L. N. FREDERICK, a witness of lawful age, produced on behalf of the plaintiff, being duly sworn on the Holy Evangely of Almighty God, deposes and says as follows.

Direct examination.

By the EXAMINER:

1. Q. State you name, residence and occupation?

—. L. N. Frederick; Whitmore Heights, West North avenue, Baltimore; my occupation is superintendent of the Lake Roland Elevated Railway Company.

2 Q. Do you know the parties to this suit?
A. Yes, sir.

Mr. CARTER:

3 Q. How long have you been superintendent of the Lake Roland Elevated Railway Company?
A. Since the company was incorporated.
4 Q. What connection had you with the North Avenue Railway Company?
A. I was the secretary to the board and superintendent of that road.
168 5 Q. Is that one of the companies out of which the Lake Roland Elevated Railway Company was formed?
A. It is.
6 Q. Were the cars of the North Avenue Railway Company, while you were its superintendent, moved by electric power?
A. They were altogether.
7 Q. About how long were you superintendent of that company before it was merged into the plaintiff?
A. The North Avenue Company was opened as an electric road in May, 1890, and in the spring of 1892 it was consolidated with the Baltimore Hampden and Lake Roland Railway Company, under the title of the Lake Roland Elevated Railway Company.
8 Q. When did you become superintendent of the North Avenue railroad?
A. In April, 1890.
9 Q. What were the termini of the North Avenue Railway Company before the passage of the ordinance No. 23 of 1890; that is, the ordinance which gave the right to the elevated road on North street?
A. The road ran from McCulloh street and North avenue, out North avenue to Walbrook, and through Walbrook to the Windsor Mill road.
10 Q. How far was that about?
A. A distance of about three miles.
11 Q. What is the route of the plaintiff's road as operated at this time?
A. The North Avenue line of the Lake Roland Railway Co. is operated from McMechin street and North avenue to the Windsor Mill road, beyond the Walbrook property, a distance of about four miles, the present road.
12 Q. Are you then familiar with the management and mode of operation of an electric city passenger railway?
A. I am.
13 Q. Are you familiar with Lexington street?
A. I am.
14 Q. What is the souhern or central city terminus of the plaintiff's railroad at this time?
A. Corner of Lexington and Charles streets.
15 Q. What is the route or routes of road which it proposes to operate when the works now under construction by it are finished?

In your description, please start at the corner of Charles and Lexington streets.

A. It is proposed by our company to operate a line of railway from the corner of Lexington and Charles streets down Lexington street to North street, out North street to North avenue, and out North avenue to Oak street, where the two lines diverge, the
169 Roland Park line running out Oak street to Fourth, and through several streets, across the quarry by a viaduct to Cedar avenue, and then to Elm avenue and to Roland park; the other line from the corner of North avenue and Oak streets goes out North avenue to Twelfth street to Clifton avenue to the Windsor Mill road to a place called Mount Holly.

16 Q. Then, as I understand you, from the corner of Charles and Lexington streets to the corner of Oak and North avenue, the route is the same on both lines?

A. It is.

17 Q. According to the plan of the plaintiff, how much of this road is designed to be double track?

A. The Roland Park road will be doubled-tracked for its entire length, from Lexington and Charles streets to Roland park, and the North Avenue line is double-tracked from Lexington and Charles streets to the old city limits at Payson street, and with a single track, with switches within a short distance of one another, within sight of one another, and with a double track at the end, of 500 feet.

18 Q. Explain that last; you say "at the end of 500 feet"?

A. Yes, sir; 500 feet; at the end of the Walbrook line there is a double track of 500 feet, which we found necessary to put in there in order to operate the cars on a ten-minutes schedule, which we have been running from McMechin street west.

19 Q. Is the double track, which you have mentioned in your answer to the question next before the last, the track that is now constructed or in the course of construction?

A. A part of this road is constructed double track, and the balance is being constructed as a single-track road.

20 Q. The portion of the North Avenue or Walbrook line, which is single-tracked, with a number of switches, is located how, with reference to the built-up part of the city?

A. The single track is entirely in the twenty-first ward of Baltimore city, where there are few houses; entirely in the suburbs.

21 Q. Is it practically in the country, though within the city limits?

A. It is, yes, sir.

21 Q. Please state what, in your judgment, will be the effect on the successful operation of the plaintiff's road if it were confined to a single track of railway on Lexington street from Charles to North streets, leaving out of consideration, in your answer to this question, any advantage, if any there is, which would be derived from having a fifty-foot switch at or near the corner of Charles and Lexington streets.

Mr. BRYAN: Objected to as being surmise.

A. It would be impossible to operate the lines of the Lake Roland road with a single track on Lexington street with any success at all; it would confine the operation of its cars to a schedule of eight minutes or more.

170 23 Q. Please give in some detail your reasons for saying that the schedule would be at as long intervals, as you have mentioned in your last answer?

Mr. BRYAN: Objected to for the same reason.

A. Well, it would take a car at least eight minutes to run from the corner of Lexington and North streets to Lexington and Charles street, unload its passengers, reverse the motion of the car and return to the corner of Lexington and North streets.

24 Q. Am I to understand you thus far as speaking upon the theory that there would be no switch at the corner of Charles and Lexington streets?

Mr. BRYAN: The same objection.

A. Yes, sir.

25 Q. Now, please state why it would take about eight minutes to make the round trip which you have mentioned?

A. It would take an electric car at least three minutes to run from the corner of Lexington and North streets up Lexington to Charles street; to unload the passengers and reload at that point would require two minutes more, and it would require at least three minutes more to make the descent to North street again, owing to the crossing of the cable road at Calvert street.

26 Q. When you speak of this time being consumed in the round trip between the points named, do you speak of that which would reasonably be expected as the ordinary condition of things on that street; the ordinary condition under which your cars would be run on that street?

Mr. BRYAN: Objected to for the same reasons.

A. I do.

27 Q. If any delay was caused by accident to the cars, or by vehicles being across the street and not getting out of the way, such as coal carts and other vehicles of that kind, would the time consumed be greater than you have mentioned?

Mr. BRYAN: Objected to as surmise, and also as suggestive.

A. The time I specified, eight minutes, is the time that the cars would take to make that run under the most favorable circumstances, and as a matter of fact, from practical experience in operating the electric cars, it would be impossible for any one day in the week to make that time with all cars, because of the liability to trouble with the various parts of the apparatus.

28 Q. Now, why do you say that two minutes would be a fair allowance for the time consumed in unloading and loading your

passengers at the corner of Charles and Lexington streets, and making preparation for the return trip of the car?

Mr. BRYAN: That also is objected to.

A. Well, my experience with the North Avenue road has demonstrated that it cannot be done in less time than that, and that it is more frequently four or five minutes than two minutes.

171 29 Q. What else has to be done at the terminus, besides unloading and loading the car?

A. The trolley has to be changed, the direction of the motors changed, the terminals examined and the headlights changed, and this can only be done by one of the two men on the car, the conductor being compelled to look out for the loading and unloading of passengers.

30 Q. Suppose on the trip any part of the apparatus had been so affected as to need adjustment, would this adjustment be able to be accomplished within those two minutes that you have mentioned?

Mr. BRYAN: Objected to as suggestive.

A. No, sir; as a matter of fact you couldn't make any repairs to a car in two minutes.

31 Q. Judging by your experience in the management of the electric cars, is that adjustment necessary from time to time at the termini?

A. Well, the cars have to be examined at every trip; this is positively necessary for the safe operation of the cars. The car might not get out of order for a day, and the same car might get out of order two or three times a day.

32 Q. Now, well, supposing that there was no switch, could you operate that road with an electric car and trailer behind it on a single track on Lexington street from North to Charles?

A. No, sir; the operation of a trailer on a single track would necessitate the pushing of the trailer down the hill ahead of the motor, which would be extremely dangerous and practically impossible.

33 Q. Is it or not a part of your plan for the operation of your road, to use the trailers on Lexington street?

A. Our engineers have provided, in their contracts, for motors of sufficient size and power to operate cars with trailers, and we have now three trail cars on hand, which we propose to put in shape for connection with motor cars.

34 Q. At the time the city council passed the ordinance, now in controversy, in November, 1892, had your company provided itself with motor cars?

A. We have had 25 large motor cars purchased and under construction for electrical equipments since June last, and have been continuously engaged in putting motors under these cars.

35 Q. Are these cars designed for use on the tracks on Lexington and North streets?

A. These cars were for use on both lines of our road from Lexington and North streets out to Roland Park and Walbrook.

36 Q. What is the length of these cars of which you have been speaking?

A. We have 25 cars that are 32 feet over all from outside to outside, and 4 cars which are 24 feet over all, and 3 trail cars running from 22 to 24 feet; they are not uniform.

172 37 Q. Now, suppose that you were authorized, in addition to the single track on Lexington street, to construct a switch 50 feet in length at or near the corner of Charles and Lexington streets, how far, if at all, will that privilege modify the opinions you have expressed as to the facilities af-orded by a single track on Lexington street, and give your reasons for any opinion you may express?

Mr. BRYAN: That is objected to.

A. Well, with a switch at Lexington and Charles streets, 50 feet long, we would not be able to operate more than one motor car with a trail attached, because the switch is not long enough to accommodate the two cars and allow the other cars to pass. With a single car running on a single motor car we would be able, under favorable circumstances, to run cars at a less interval than 8 minutes, taking into consideration the difficulty in switching, not only the track, but the trolley switches, we could not make as good time as though we had no switch there at all; that is, if we had a double track, but in my judgment it would be possible to operate these cars at about 5 minutes, under favorable circumstances, but that, as you understand, precludes the idea of using trailer cars.

38 Q. Am I to understand you as meaning that with the switch you could not run a trail car annexed to the motor car?

A. With a fifty-foot switch it would be impossible to run the motor car with the trail car attached.

39 Q. With the switch, and running the motor cars alone, that is, without a trail car, do I understand you that it is your judgment, that the best schedule that you can adopt, would be one that would require five minutes between the starting of each car?

Mr. BRYAN: Objected to as suggestive.

A. At Lexington and Charles streets, there would be a five-minute schedule, which would govern the schedule over the road as far as Oak street, where the two roads separate, and then the schedule from there out would be necessarily ten minutes. You understand that every car would run up Lexington street, on both lines, and you could not have on Oak street or the Roland Park line beyond North avenue, or on the Walbrook line west of that point, a car more frequently than ten minutes, which would keep us from competing with the Union line running to Woodbury or the cable line running uptown.

40 Q. What line of railway competes with you between the corner of Oak street and North avenue, and your terminus at Roland park?

A. The City and Suburban line.

41 Q. Was that formerly the Union line?

A. It was formerly known as the Union line, yes, sir.

42 Q. Does or not that same line compete with you, going from the corner of Oak street and North avenue southward into
173 the city? If so, please give the route of the City and Suburban railway from the corner of Oak street and North avenue into the heart of the city.

A. Well the City and Suburban line is a competing line with the Roland Park line of our company, for the reason that it brings its passengers within a square and a half of Lexington and Charles streets where we are; their cars running to the corner of Park and Lexington streets. The City and Suburban road runs down Maryland avenue to Park avenue, and from Park avenue down into Liberty street, and down Pratt street by way of Exchange place to *to* city hall.

43 Q. Does that one of its routes, which you have described, cross Lexington street at Park?

A. Yes, sir.

44 Q. That is the one that you referred to in your previous answer?

A. That is the line, yes, sir.

45 Q. Now, please, state how else that same line competes with you, supposing that your road starts from the corner of Lexington and Charles streets.

A. The City and Suburban line, known as the Johns Street line, runs from the corner of Park and Lexington streets, out Park street to Johns street, and out Johns street to North avenue, terminating at Madison avenue, and it would compete with our electric line which passes over the same tracks from the corner of Johns street and North avenue to Madison avenue.

46 Q. Now does the City and Suburban railroad own any tracks on Holliday street?

A. They own what is commonly known as the York Road line on Holliday street.

47 Q. Do they own tracks on North avenue from the York road over to Madison avenue?

A. They own these tracks and are operating them, or are about to operate them, under an agreement with our company, jointly.

48 Q. Would the line of that company, on the York road, going into Lexington street and Holliday street, as you have described, running out to North avenue, and thence along North avenue to Madison avenue, also compete with your road?

Mr. BRYAN: Objected to as surmise.

A. Yes, sir, it would be a competing line.

49 Q. Does the line of railway, formerly known as the North Baltimore railway, compete with your line; if so, how?

A. The North Baltimore railway, which is about to be equipped with electricity, is one of the strongest competitors we could possibly have.

50 Q. Describe its route.

A. One route out Charles street to Centre, and up to Howard

street to Linden avenue and North avenue would reach at
174 Lexington and Charles streets, the very points that we pass; whilst its Edmondson Avenue line to Walbrook would be a very strong competitor.

52 Q. Now, as the railway of the line you last mentioned passes the corner of Charles and Lexington streets, going up Charles street, what, in your judgment, would be the effect on your passenger traffic, as regards those passengers who could reach the common point over either road, if your schedule was extended to five-minute intervals between the starting of your cars, and if the other road were at liberty to make their schedule at half that time?

Mr. BRYAN: That is objected to as surmise and speculative.

A. Either of the North avenue lines would come into competition with the Lake Roland lines, and the Lake Roland line would be at great disadvantage, for the simple reason, as I stated before, to start either one of our lines at more frequent intervals than ten minutes. Of course nobody will wait ten minutes on our cars, to reach a common point, when they could use the North Baltimore line in five minutes time, or less than that. You see the five-minute schedule from Lexington and North streets would confine either one of our lines to a ten-minute schedule, running cars alternately up Lexington street to Charles.

52 Q. You have said that for 500 feet from your terminus of the Walbrook portion of your road you have a double track, and I think you gave some explanation of the origin of that. Please state again what you have to say as to the construction of that 500 feet at that terminus?

A. When the Walbrook line was first built to Mount Holly, we got 1,200 feet of single track at the end of the road, and when we began to operate cars on a schedule of ten minutes in the summer time, we found it impossible to make time or to run the road successfully with this single track at the end, and for that reason we constructed the double track of 500 feet, which enabled our cars then to run at the end of the line without waiting for the car to the terminus to come down off the single track, and experience has demonstrated, and I have had experience in railroading outside of the North Avenue road, because I was for 15 years with the Pennsylvania railroad, that it is impossible to operate any railway successfully with a single track at the end; it cannot be done.

53 Q. Am I to understand you, then, as saying, that from your experience, not only with this electric road here, but from your experience in the operation of railroads generally, that the single track at the terminus of the road is more disadvantageous than a single track on any other portion of the road?

A. Decidedly so; decidedly so.

54 Q. What appliance or mode of operation is now sought after at the terminals, by roads propelled by electricity or other rapid motive power?

A. The efforts of street-railway managers all over the country, Mr. Carter, was to have at the terminus of the road a loop whereby

to operate the cars, to prevent delays and accidents in
175 switching and reversing the current, and with a single track on Lexington street, between North and Charles streets, with the Point Breeze road running over the same track into Calvert street, it would be perfectly impossible for us to operate that road with any degree of success at all, or in the same manner as any other city passenger railway is operated.

55 Q. Now you have mentioned it; I intended to ask you with reference to the Point Breeze road. The Point Breeze road, I will assume in the question, has a right to run its cars on your tracks between North and Calvert streets. Are you familiar with the location and the mode in which it is proposed by that company to use the tracks of your company, and to get off of them at the corner of Lexington and Calvert streets?

Mr. BRYAN: Objected to as that is regulated by the ordinance.

A. The city ordinance authorizes the Highlandtown and Point Breeze railroad to run their cars on our tracks and to turn them off at Monument square on Calvert street, and in order to do that, they would have to run both ways on the single track, and add further complications to the arrangement of running two of our lines on a single track, which would be almost impossible to operate anyway, in any shape.

56 Q. If your road can only have a single track on Lexington street, at what point would it be obliged to connect its North street track with the single track on Lexington street?

Mr. BRYAN: Objected to.

A. As a matter of fact, if we were confined to a single track on Lexington street, the double track would have to begin on North street, and that would add another complication to running up there; the motorman cannot see around the corner.

57 Q. Of what?

A. Of Lexington and North streets.

58 Q. Well, how would that interfere with the safe operation of your road?

A. Well, that would add additional expense to the road, and be altogether unsatisfactory. The liability to accident; cars running in on one another at this point; especially so, as the double track would have to commence just at the descent from the elevated railway.

59 Q. Explain what you mean by your last answer.

A. I mean that the change from a single track to a double track would have to be made on North street, and at the foot of the incline leading to the elevated railway, which would be a very dangerous point.

Cross-examination.

(Mr. BRYAN:)

1 X Q. How long is one of your motor cars?

A. We have 25 motor cars, 32 feet long; and 4 motor cars, 24 feet long.

176 2 X Q. How long is a trailer?

A. We have 2 trailers, 22 feet long, and one trailer, 24 feet long, and future purchases of equipment would be the standard trailer of about 24 feet.

3 X Q. How can you tell what will be done in the future?

A. I know from the standard cars that are manufactured by the railway car builders throughout the country.

4 X Q. You now have 3 trailers in your company's possession, have you not?

A. Yes, sir.

5 X Q. Cannot any one of these 3 trailers, with one of your shorter cars, be placed on a switch that was 50 feet long?

A. That would be impossible, as it would leave only one foot clearance at each end of the switch, which would bring the car too near to the car passing on the other track.

6 X Q. How far does each one of your cars overlap the rail?

A. The gauge of the track is 5 feet 4½ inches, and the width of the cars is 7 feet 6 inches.

7 X Q. That would be——

A. 13 inches.

8 X Q. 13 inches on each side?

A. Yes, sir.

9 X Q. Then your car will take not only the width between the track, but in addition to that, 13 inches upon each side of that width to be operated on?

A. That is the standard width of all cars, yes, sir, of the Baltimore gauge.

10 X Q. If you are permitted to have a double track on Lexington street from Charles to North, on what schedule do you think you will run your cars?

A. We can run our cars on a schedule of two minutes, or about the time it would take to load and unload passengers.

11 X Q. Then if you run your cars on a schedule of two minutes you would at all times have in motion not less than two cars between North and Charles streets on each track, is that not true?

A. Yes, sir.

12 X Q. At what rate of speed do you propose to run your cars?

A. The ordinance requires our cars to be run at a rate of speed not exceeding ten miles an hour in the old city limits, if I remember correctly, and at certain places where cars of other roads, especially cable roads, cross us, we reduce the speed to a mile an hour almost; barely pass the corners.

13 X Q. Then if you are permitted to keep your tracks in their present condition, you will run at a rate of ten miles an hour on Lexington street, from North to Charles, with the exception of the points where you cross the cable cars; where you would slack up?

A. No; it would be impossible to do that.

177 14 X Q. At what rate then do you suppose you would run your cars on Lexington street, between Charles and North; what is the minimum rate at which you run them?

A. I don't think it would be possible to run these cars at a higher rate of speed than five miles an hour; in the first place the grade of Lexington street is very heavy; is very steep.

15 X Q. Then if you run them at the rate of five miles an hour, you would have more than two cars always on each track, would you not; it is eleven hundred and odd feet from Charles to North street?

A. We would have about two cars in each direction according to that.

16 X Q. State whether or not you know the width of a fire engine.

A. No, sir.

17 X Q. Do you know whether a fire engine could pass your cars between the curbstone and the side of the car?

A. I do not.

18 X Q. Then you cannot tell whether or not, in case it was necessary for a fire engine to go up and down Lexington street at a high rate of speed, it would be able to do so without pulling in and out several times when your car was there?

A. No, sir; I do not; I do not know anything about a fire engine; I never thought of that. I notice, however, that there are many places in Baltimore city where the spaces between the curb and the rails are less than those on Lexington street, as those tracks are now laid.

19 X Q. Please do not argue the other allegations of the bill, but confine yourself to the answer of the question. How far from the point where you were authorized to commence constructing your road, under ordinance 23 of April, 1891, is the present running terminus of your road; that is from the corner of McCulloh street to McMechen on North avenue?

A. It is about 4,700 feet.

20 X Q. Then under the provisions of your ordinance, you have only operated your road over a distance of about 4,700 feet; that is so?

A. We have run cars for the distance of 4,700 feet under this ordinance.

21 X Q. Do you run a single-track or a double-track road in the city now?

A. We run on a double-track road.

22 X Q. Do you operate your cars on a double track as far down as McMechen street?

A. We operate the cars on a single track in the old city limits at present from Park avenue to McMechen street owing to the construction of the city sewer in the east-bound track.

23 X Q. No car of your road has ever gone so far east as this side of the North-avenue bridge, has it?

A. We have never run a car over the North-avenue bridge.

178 24 X Q. You have a double track, or rather the authority to lay a double track on North street from Fayette to Lexington, have you not?

A. We have.

25 X Q. When your road is in operation do you propose to run some cars, I presume, to the corner of North and Fayette, and other cars to the corner of Lexington and Charles, is that so?

A. At the present time I am not aware of what provisions the company has made for the operation of the track on North street between Fayette and Lexington.

26 X Q. You are not authorized to say that they do not wish to use that privilege at all?

A. I don't know anything about it; the company has changed officers so frequently that I don't know what the plans of the present officers are in that particular.

27 X Q. Suppose your company intends to utilize the grant to run cars as far south as Fayette street, would it not be perfectly feasible to allow car No. 1 to run up on a single track to the corner of Lexington and Charles, and car No. 2 and car No. 3 both run to the corner of Fayette and North, and then car No. 4 run up to Charles street, and would not that prevent the effect that you have spoken of, of the single track on Lexington street restricting the running of the cars on the other part of the road to a schedule of 10 minutes?

A. It is perfectly possible to run the cars down there, but it is not in accordance with the plan of our company in operating its cars or in constructing its road, as set out in its prospectus before the granting of the ordinance; they said distinctly that they wanted to run the cars to Lexington and Charles streets to catch the shopping trade.

28 X Q. There is nothing immutable about the plans of the company; no reason why they could not be changed, if the company wanted to change them?

A. Except that we could not run our road as we designed, in order to catch the shopping trade.

29 X Q. With a switch of 50 feet at the corner of Charles and Lexington streets, and I am assuming now that you do not intend to run down to North and Fayette streets, could you not run a trailer on every second or third car?

A. Well that is practicable, but the cars without the trailers would unfortunately be every alternate car, and would therefore be the car of one line, of either the Walbrook or the Roland Park line, which would leave without proper accommodation those riding on the other line.

30 X Q. Well, would there be any insurmountable difficulty about letting the car without the trailer be every third car?

A. No, there is no difficulty about that, except that it does not meet the requirements of the company or travel, as demonstrated by the traction company here.

31 X Q. You spoke of the danger of accidents and collisions, which would be occasioned by the motormen not being able
179 to see around the corner. Would not that in some measure be mitigated, if you had a watchman or flagman or lookout stationed at the corner?

A. That would relieve it to some extent, but the anxiety in which

the flagman would be placed by the Point Breeze cars running in there and coming out, whether they were going in or whether they were coming out, would cause an endless source of annoyance, and would cause the cars to run backward and forward, in case they did come down on a single track, which is altogether dangerous.

32 X Q. Don't you think you can find a man in the city of Baltimore who, for a reasonable compensation, would be able to distinguish between your cars and the Point Breeze cars?

A. I suppose a man could be found who might not make a mistake, but that is not the experience of the Baltimore Traction Company, with high-priced men at the corner of Fayette and Paca streets, for this very thing has caused their cars to be laid up there four or five times today.

33 X Q. Do you know that to be a fact, or have you heard it?

A. I know it to be the fact; I was up there today and saw it.

34 X Q. Don't you know the Point Breeze ordinance stipulates that the cars are to be run over your track in such a manner as not to interfere with your schedule; and that if the Point Breeze Company use them, they must come there without interfering with your schedule; don't you know that the ordinance has that provision; don't you know that fact?

A. I do not know it, but I have reason to believe it is so; but we have had that very trouble on North avenue, where Mr. Perin's horse cars and our cars run, caused by the stupidity of his drivers, or the carelessness of the watchman there, and pile the cars all over the street.

Redirect examination.

Mr. CARTER:

1 Re-D. Q. You have mentioned in one of your answers to one of the cross-questions, that in the prospectus put out by the North Avenue Railway Company, which was the company that secured ordinance No. 23, it was stated that the design of your road was to have one of its termini at the corner of Charles and Lexington streets, with a view of reaching the shopping trade. Now, I will ask you whether the corner of Charles and Lexington streets is or is not a very important point for your cars to touch in order to get traffic; and if so, why?

Mr. BRYAN: That is objected.

A. The Lake Roland Railway Company would not be able to enter into compensation with the other city passenger railway companies if they do not go up to the corner of Lexington and Charles streets, for the simple reason that this is the center of the retail trade, and my observation today, and for the week past, has demonstrated that the North Avenue Railway Company unloads the great bulk of its passengers at Charles and Lexington streets instead of
180 bringing them down to Baltimore street. I don't know whether it is any testimony or not, but I will say in obtaining our ordinance to run to Lexington and Charles streets we had

the privilege of throwing out either Baltimore and North street or Charles and Lexington, and we voluntarily threw out the Baltimore and North street end and retained the Charles and Lexington street end because we thought it would be more important to us.

Mr. BRYAN: The counsel for the defendant objects to the last part of that answer as not competent evidence.

Recross-examination.

Mr. BRYAN:

1 Re-X Q. Am I to understand you as seriously telling the court that if you were to have your terminus at the corner of North and Fayette streets, right in front of the city hall, within one square of the post office and two squares of the court-house, that you think it would be impossible to compete with other roads?

A. I do, for the simple reason that our road runs through a residence portion of the town, and that the great bulk of travel we would get would be the ladies of the household, who would come down to do their shopping.

General question by the EXAMINER:

Do you know, or can you state any other matter or thing that may be of benefit or advantage to the parties to this suit, or either of them, or that may be material to the subject of this, your examination, or the matters in question between the parties? If yea, state the same fully and at large in your answer.

A. No, sir.

The signing of his depositions by this witness is waived by agreement of the solicitors for the respective parties.

JAMES L. MCLANE, a witness of lawful age, produced on behalf of the complainant, being duly sworn on the Holy Evangeley of Almighty God, deposes and says as follows:

Direct examination.

Mr. CARTER:

1 Q. You are the president of the complainant in this case?

A. I am, yes, sir.

2 Q. How long have you been such?

A. Since the latter part of October, 1892.

3 Q. What experience did you have in the direct management and operation of city passenger railways in the city of Baltimore, before you became the president of the plaintiff?

Mr. BRYAN: Question objected to.

A. I was president and general manager of the North Baltimore system of roads for some seven years, until the spring of 1892.

181 4 Q. To what company does that North Baltimore Passenger railway belong?

A. It belongs to the Baltimore Traction Company.

5 Q. Describe the route or routes of that railway?

A. It has, starting from German and South streets, a line up German to Charles, to Saratoga, to Park avenue, to Franklin, to Edmondson avenue, and then Edmondson avenue to the Liberty road, connecting with the old Baltimore & Powhattan road, crossing North avenue at the Liberty road. Then it has two lines starting from the same point, German and South, and running over the same streeets as far as Howard street; then out Howard to Linden avenue, and out Linden avenue, one line to North avenue, and the other out McMechen street to North avenue, and then across North avenue bridge to North Charles street again. Then it has a line from Camden station out Howard street to Maryland avenue to North avenue, and out Charles street extended to Huntingdon avenue and to the York road.

Mr. BRYAN: Does not one line run to Waverly?

A. It has two branches out there; one goes across Huntingdon avenue to the York road, and the other up to Waverly.

6 Q. State whether the plaintiff, since you became its president, laid on Lexington street, between Charles and North street, double railway tracks under the ordinance No. 23 that has been referred to so often, of 1891, under which ordinance it was authorized to lay tracks?

A. Yes, sir.

7 Q. Now please look at Plaintiff's Exhibit No. 7, and say whether the location of the tracks, as now laid on Lexington street, between North and Charles is correctly shown on that plat?

A. I believe this is a correct representation of the plat (referring to the exhibit).

8 Q. Now, please look at Plaintiff's Exhibit No. 8, and state whether or not the same correctly represents the location of the plaintiff's tracks between North and Calvert streets?

A. (After inspection of exhibit). I believe it is.

9 Q. State all of the facts connected with the laying of the plaintiff's tracks on Lexington street, and with the location of said tracks in the position shown by Plaintiff's Exhibit No. 8. My question is all you know in reference to the laying of the tracks on the whole of Lexington street, and then what you know in reference to the location of them as shown on that Exhibit No. 8?

A. Well, the city commissioner came to the railroad compan-'s office with his assistant, Mr. Duvall, and our contractor, on the 31st of October and found fault with the contractor and officers of the road for having gone to work without having his approval of the location of the tracks on Lexington street. I asked him if he had stopped the work; he said, yes. I told him that there could not be any great harm done, and they had only to have his ap-

182 proval of the location of the tracks, and I arranged with him that Mr. Smith would come to his office and settle their location. The work, as begun, provided for location other than in the middle of the street. It has never been customary, never is customary, to have any question or any approval of the location of the

tracks, when they are in the middle of the street; it is only when they are not placed in the middle of the street and conform to the grades, that there is anything for him to approve. That is the normal location of the tracks, and whenever we place them out of the middle of the street, it has been customary, in my experience, to have his approval. I told him that I supposed the location had already been settled and approved by him before I had anything to do with it, but that it could be made satisfactory to him at once, and I told Mr. Smith to go to his office and make it so. Mr. Smith reported to me later that he had arranged the location of the tracks to be pushed over to the south side of Lexington street.

10 Q. Between what points?

A. Between Calvert and North streets. That he had arranged it with the city commissioner, but that as it went over, far over to the south side, the city commissioner desired to have the mayor's approval of it before he authorized us to go ahead, and that he had made an appointment to go the mayor's office the next day, I think. His report to me was on the 1st of November. I told him I would go with him to the mayor's office. We did not see the mayor for two or three days. I think it was the 3rd of November we saw him, he had been out of town and we did not see him for two or three days. On the 3rd of November, as I recollect, we went to his office at 12 o'clock by appointment, and Mr. Smith and myself were delayed some little while in his main office, he being in conference with the city commissioner and the city solicitor in his own office. We were delayed, and the city commissioner came out and asked me for a copy of our ordinance, which I found in the mayor's bookcase for him, and sent in. After that conferenee ended, the city commissioner, Mr. Smith, Mr. Duvall, the city commissioner's assistant, and myself, went into the large room. The city solicitor had gone away, and the map or drawing of which Exhibit No. 8 is a blue print, was on the mayor's table, and was examined by him and the city commissioner, and explained by Mr. Smith. The mayor expressed great dissatisfaction that the ordinance permitted us to lay two tracks, and said that he was very much surprised that Mr. Davidson should have ever signed such an ordinance. I told him that I did not know that the question of two tracks was a matter of discussion at all; that I supposed that had all been considered at the time the ordinance was passed, as also the question of putting another railroad on these two tracks had been considered by himself a few months before, and I thought that the only matter he had before him today was the location of these tracks. Well, he said, there was no question that we were to have two tracks; this was the proper arrangement for that.

11 Q. The one shown on the blue print?

A. Yes, sir; that there was left a clear space on the north side, and the city commissioner said that he preferred that it
183 should go a little further to the south even, and I told him if he would rather have it—it was some little distance, I think maybe a foot—and I told him if he preferred to have them that way, to say so, and we would locate them accordingly, and he

said he would, and I told Mr. Smith to have the tracks put there as indicated by the city commissioner, and then to bring the tracing which showed that, and to have his approval of it, and then go to work in laying them. I think that is all.

12 Q. Are the tracks as indicated on the blue print——

A. That is a blue print of the final location of the tracks as located by the city commissioner. He took back that drawing that he had there, and put these drawings as shown on this blue print, put them a little further over to the south, nearer to the post office; the advantages of that arrangement were discussed there; it gave a larger space here, and the fact that this was a public building made it less objectionable to put it over on that side. I called their attention to the fact that the same arrangement has been made on Lombard street by the traction road, and in one or two places in Washington, where, being in front of a public building, the tracks were put near the curbstone.

13 Q. The public building to which you refer, is the post office?

A. Yes, sir; the whole of that block is occupied by the post office.

14 Q. On the south side of Lexington street?

A. On the south side of Lexington street; yes, sir.

15 Q. Was any question made in the interview, which you have spoken of, with the city commissioner or mayor as to the location of the tracks between Calvert and Charles streets?

A. No; I think the only reference that was made at all to this portion was something was asked about the crossing at Calvert street.

16 Q. Of the Bowie line?

A. Yes, sir; and I remember it was explained either by Mr. Smyrk, or Mr. Smith, or Mr. Duvall, I don't know which, to the mayor, that the tracks at Calvert street would work back to the middle of the street. That explanation was made as we stood around the table by one of these men, that at Calvert street, after crossing the blue line cable road, the tracks work over to the centre of the street; this explanation was made by some one of them; I think it was by Mr. Smyrk, but it was some one of them explained it to the mayor, as this map was being explained, which was that we could keep to the south side. There was a great deal said about the engine-house and the advantage of having as wide a space as possible on the north side there.

17 Q. The engine-house being on the north side?

A. Yes, sir; and the mayor was very emphatic in his approval of the location on the south side.

18 Q. Were you present when the endorsement, that now appears on the plat, was made?

A. I think it would be proper for me to say that when I first went in, the mayor in making his objection to the two tracks,
184 appealed to me to know if I did not think the street was too narrow for two tracks between North and Calvert streets, but I told him it was no narrower than a good many streets that I was familiar with; I told him it was about the same width as Charles street. I afterwards had Charles street measured and found that it was exactly the same width. I thought it was a little wider, but

I told him it was as wide as a good many streets, and I thought it it was as wide as Charles street.

19 Q. Were you present when the endorsement, that now appears on Plaintiff's Exhibit No. 8, was made?

A. No.

20 Q. The date of the interview that you have spoken of, what was that day?

A. I think it was the 3rd of November; it may have been the 4th, but it was the 3rd I think. The mayor was out of town two or three days; two days, I think, and my recollection is it was the 3rd.

21 Q. After this action of the mayor and city commissioner, which you have detailed, did the contractor, who had charge of the construction of your road, proceed with the work?

A. He went on at once after that, after this map was approved; that drawing was approved in the afternoon, and I am quite sure he went to work the next morning and worked on that square for the rest of the week, certainly; and there was some work done on this square; on Monday again they were working; they continued to work on this square all this week.

22 Q. Does the North Baltimore lines of railway, that are now owned by the traction company, compete with the road of which you are president; if so, at what points?

A. They are what I would call special competing lines with this road, or this road with them, as you may take the case. This road going along North avenue, goes through the same territory from Eutaw square, Eutaw place, one square from the terminus of the Linden Avenue Extended line; it goes over the same territory from that point to Charles and North avenue, right and left; it competes, therefore, with its three lines. It competes with its Linden Avenue Extended line, what is known as its boundary line with the terminus at Boundary and North avenue, and its Maryland Avenue line, which crosses at Maryland and North avenues and goes to Charles and Lexington streets as a terminus, which is a point common to two of its lines, and reaches at this Charles and Lexington street terminus the shopping centre; which is also reached by all three of the North Baltimore lines, and the Maryland Avenue line; all three of the North Baltimore lines pass through the shopping district.

23 Q. What other roads, passing Lexington street, would be competitors with this road?

A. The York Road line, owned by the City and Suburban and Blue line of the City Passenger railway, both cross Lexington street.

185 24 Q. Well, what other road crosses Lexington street, west of Charles?

A. The Maryland Avenue line, and the Johns Street line of the City and Suburban Railroad Company, which cross Lexington street, west of Charles, and reach the same shopping centre or shopping district.

25 Q. What motive power is about to be used, if you know, on all of these three lines which you have mentioned?

A. The Blue line of the City Passenger is now being cabled; the

lines of the North Baltimore road and the Traction Company lines, and the City and Suburbrn are about to have electricity; many of the poles already are up on these lines.

26 Q. Please state whether or not the use of Lexington street by your road is a valuable right, in connection with its route or routes?

Mr. BRYAN: Objected to.

A. I have always regarded the Lexington and Charles street terminus as by far the most valuable terminus in the ordinance. My attention was particularly called to it at the time the ordinance was passed, for I was then interested in the North Baltimore roads, and managing it, and I think this Charles and Lexington street terminus is the most valuable part of this franchise.

27 Q. Why do you think so?

A. I think so; looking at the operation of the present roads; for instance, the Traction Company cars which go up Fayette street, go up from the centre of the city, get their real loads after they leave Monument square; they get their load along Fayette street to Charles; there you see the crowds of people waiting to take them, and not from the centre of the city. They take a good many business men, of course, from that part of the city, but even the business men work their way up and take the roads at their shopping district; they meet their friends and family and take the cars at this point. My own experience on the North Baltimore road is we ran empty around the circuit.

28 Q. Describe what you mean by the circuit?

A. About the city hall; Holliday street and North and South streets. They go around that empty and they begin to pick up their load along German, after they get to Calvert street and Charles street, and up Charles street and at Charles and Lexington, and the same rule holds good to the City and Suburban. Their best point is Lexington and Park streets. The old North Baltimore Camden Street line would go empty to Baltimore street, and at Baltimore, at Fayette and Lexington, it would take on its load; in other words, the shopping district is where these cars get their passengers, and I have never considered that a terminus at North and Fayette streets, near the city hall, compared with a terminus in the shopping district.

29 Q. Please state your judgment as to the effect on the efficient operation of the lines on the plaintiff's road, the reduction from double to single tracks on Lexington street would have?

186 Mr. BRYAN: Objected to as a matter of speculation and surmise.

A. With a single track on Lexington street, between North and Charles, we would be able to run cars no closer together than would allow time for a car to go from North to Charles street, discharge its load and take on a new one and get back to North street.

Mr. BRYAN (interposing): That is, without the switch?

A. I say, with a single track; without the switch; that is the

best we could do, and as we would be confined to 5 or 6 miles an hour, at the best, at that part of the city, on Lexington street, I do not think it would be possible or safe to operate a car on Lexington street at better than 5 or 6 miles an hour. It would take 2 or 3 minutes to go up and 2 or 3 minutes to discharge and get them on, and 2 or 3 minutes to come down. It would take 8 or 9 minutes to make that trip. The single track would have to be on North street, really; and 8 or 9 minutes, I think, would be the interval at which cars would be run through.

30 Q. Do you know the intervals at which the traction company runs its cable cars on Fayette street?

A. They have been running, ever since the Gilmor-street line was open, 8 cars in 10 minutes. Before the Gilmor-street line was open, they ran on two-and-a-half-minutes street, as we call it; two-and-a-half-minute intervals. There would be some little variation here or there, but they ran 4 cars in 10 minutes. They ran on what we call two-and-a-half-minute street. Since the Gilmor-street line was opened they are running 8 cars in 10 minutes.

31 Q. Does the traction line then use Fayette street for both its Gilmor Street and its Druid Hill Avenue lines?

A. From Lombard and South street to Fayette and Paca they run both lines on the same track.

32 Q. And in running them, they run about eight cars in ten minutes?

A. About eight cars in ten minutes; that is their running time, yes, sir.

33 Q. Now, if you were authorized to have two tracks on Lexington street, please state whether or not it is the design of your road to run the cars which would run on both of its lines, that to Roland park, and that to Walbrook and the Windsor-mill road, to the corner of Charles and Lexington streets?

Mr. BRYAN: Objected to.

A. That certainly is and certainly would be as long as I manage the road.

34 Q. Now, supposing that the traction company, which owns the North Baltimore lines, ran its cars on Charles street at the same interval that it has been running; that it had run its Druid-hill line on Fayette street, that is to say, an interval of two min-
187 utes or two minutes and a half, and the City and Suburban railways ran its line that crossed Lexington street at Park, at the same interval, what effect, in your judgment, would the running of the cars of these lines at these intervals have upon the business of your road, if you were reduced to a five-minute or a greater interval?

Mr. BRYAN: Objected to.

A. Well, a road running at long intervals is at the greatest possible disadvantage when it is at all in competition with a road running at short intervals. With rapid transit on the old North Baltimore and the City and Suburban and the cable roads, with our

electric motive power, we would be very little better off, in my judgment, before the public, that if we ran with horses; we would have one of the main disadvantages of the horse-traction system, the long intervals. Then there is another consideration, which is, I think, very important. The great feature of rapid-transit roads, whether electric or cable, is to have short intervals, not only to run fast when they are running but to run at short intervals. Once that your machinery is in motion and kept in motion, you have so large an item of your expense going on, whether you run cars of ten minutes or three minutes; that it is the great effort of all rapid-transit roads to run frequent cars, so as to utilize their power, so as to get all the travel they can for the power which is common for the long or short intervals.

35 Q. Supposing that you had the double track on Lexington street, at what intervals do you propose to start your cars from the corner of Lexington street and Charles street?

Mr. BRYAN: Objected to.

A. At three-minute intervals.

Adjourned to Thursday at 3 o'clock p. m.

The taking of testimony was then adjourned to the 16th day of December, 1892, at 3 o'clock in the afternoon and same place, at which last-mentioned time and place I attended for the examination of witnesses, due notice of such meeting having been given, and in the presence of the solicitors for the respective parties, I proceeded to take the following depositions, that is to say:

JAMES L. MCLANE resumed.

Mr. SEMMES:

36 X Q. Please state what is the standard gauge of street railways in this city?

A. Five feet, four and one-half inches.

37 Q. That is the gauge of the Lake Roland Elevated railway, is it not?

A. Yes, sir.

38 Q. Does this gauge differ from that in other cities; and if so, why?

A. I think this is the only city that has so wide a gauge; it was adopted when the city passenger railway was constructed, in order to conform to the Maryland gauge of wagons and vehicles, generally.

188 39 Q. In the rails that are laid, how are they made with reference to use by the cars and other vehicles?

A. Well, the pattern that was adopted originally by the City Passenger railway, under the requirements of the city authorities, consisted of the pattern which is now in use; it has the head of the rail on which the car wheels run, and then it was required to have a flat tram surface for vehicles to run on.

40 Q. Vehicles other than the cars?

A. Yes, sir; the vehicles of the city; ordinary vehicles. The car wheels don't touch that tram at all; they don't use it or touch it. It is intended and unquestionably used by the ordinary vehicles of the city. We have never been allowed, in this city, to use any other pattern. There are other patterns intended to keep vehicles off of the rails, but in this city we have always been required to furnish a way for carriages, as well as a way for cars, and our rail is adapted to that purpose.

41 Q. Is that the character of rail which has been laid by the Lake Roland Elevated Company?

A. Yes, sir; and with the approval of the city commissioner. He required this rail to be laid from the city limits in. He would not allow a rail without the tram or with a narrow tram to be used, and the work was delayed quite a little while to make the change; so that standard, his pattern, is being laid under his directions from the city limits in; there is no other rail in use.

42 Q. What effect, if any, has the presence of the street-railway tracks on the street had upon the use of the street as a highway for other vehicles in Baltimore?

A. Our experience has been with this pattern of rail, which we use, that we furnish a very improved road-bed for heavy traffic; all the heavy wagons, carts and drays of the city use the railway track, and of course the drive is very much easier on the track than it is on the ordinary paved streets, the ordinary stone streets; another effect has been to relieve the block of vehicles in the street; I mean blockades in the street, put it that way.

43 Q. Blockades?

A. Yes, sir; to relieve the travel, we have it being for vehicles to follow the track.

44 Q. Up and down?

A. Yes, sir; we have a very marked example of it on Charles street. For a good many years we operated on one track on Charles street, between Lexington and Saratoga, and there was great opposition to our laying the second track on that square, when we asked for the privilege. But after a great deal of discussion and explanation, I think we satisfied pretty much every property-owner on the square that the effect would be to relieve the street materially, and those who objected to it and protested against it, withdrew their objection and endorsed our application, and they were all perfectly satisfied afterwards that the effect of the two tracks was to turn the travel up and down, following the tracks, taking the line of travel in that way and really relieving the street very much.

189 44½ Q. Well, that part of Charles street, you have already stated, was the same width as Lexington street between St. Paul and Charles?

A. Between St. Paul and Charles and between Calvert and North.

45 Q. Charles street is a street of the same width——

A. (Interposing.) The same width between the curbs as these two portions of Lexington street.

Cross-examination.

Mr. BRYAN:

1 X Q. You keep a horse and carriage, don't you?

A. Yes, sir.

2 X Q. Do you find it much less convenient to drive on the streets where there are railway tracks than on the streets where there are no railway tracks?

A. For a great many years I have had my wagon to conform with the gauge of the tracks, and I drive on the tracks habitually. My own wagon for a good many years has conformed to the track gauge, and I think that it is, a street that has tracks on it, the best part of it is on the rail.

3 X Q. But some of us have wagons that do not conform to the tracks.

A. A great many wagons, I may say all the wagons that come from the north and east, are the narrow gauge, narrower than the railroad gauge, and a great many light wagons made in the city, pleasure wagons in the city, are made on the New York gauge, and are narrower than our tracks; I have driven these very often, and I do not think there is any serious inconvenience or embar-assment in driving them.

4 X Q. Don't you think it is injurious to the wheels of the ordinary pleasure vehicle to turn in and out from the tracks?

A. I never thought that it hurt the wheels a great deal; as between the injury done by the rail and the ordinary cobble-stone pavement, it would be very difficult for me to know which one to blame the injury to my wagon on.

5 X Q. But you would prefer to drive on a street like Cathedral street, with a fair good Belgian block pavement, and no car rail, to driving on any street where there were car rails, would you not?

A. Merely as a question of agreeable driving with light wagons or pleasure wagons, I would of course, rather drive on a good pavement, without railroad track.

6 X Q. You said in your testimony the other day that the Blue line was one of your competitors; Governor Bowie's Blue line?

A. Yes, sir.

7 X Q. They would compete with you by hauling passengers from the northern section of the city to the corner of Lexington and Calvert streets, would they not?

A. From the northern portion, yes, sir.

190 8 X Q. And the city and suburban roads would compete with you by hauling passengers from the northern section of the city to the corner of Lexington and Park streets, would they not?

A. Yes, sir.

9 X Q. How far is the corner of Lexington and Park streets from the corner of Lexington and Charles streets?

A. Two blocks.

10 X Q. How far is it from the corner of Lexington and Charles streets to the corner of Lexington and Calvert streets?

A. Three blocks.
11 X Q. And from North to Charles is three blocks?
A. Yes, sir.
12 X Q. How long is the square from North to Calvert streets?
A. This plat, Exhibit No. 6, says 284 feet.

Redirect examination.

(Mr. SEMMES:)

1 Re-D. Q. Do you know anything about the expenditure of money in the construction of this road by your company?

Mr. BYRAN: Of your own knowledge?

A. I know that large expenditures have been made in the construction of the work.
2 Re-D. Q. Can you give us roughly what this expenditure, including obligations not yet matured, amounts to?
A. Including the work of construction it is in the neighborhood of a million dollars.

Recross-examination.

(Mr. BYRAN:)

1 Re-X Q. Your charters call for how much capital stock?
A. The charter calls for a million of capital stock.
2 Re-X Q. How much of that capital stock has actually been paid in in money; as much as $16,000?
A. Well, I think it is a trifle less than $300,000. I think it is $287,000 or $290,000 worth of stock that has been issued.
3 Re-X Q. But you say a trifle less than $300,000 has been issued?

Mr. SEMMES: Paid in in cash?

A. Because more, I think, has been paid in; I think $300,000; I will not say I think; I know that from the examination of the books, that $300,000 was expended against the stock accounts; the stock account represented an expenditure of a little over $300,000; the distribution of shares between the two companies made $290,000.
4 Re-X Q. What I want to find out is how much of that expenditure actually represents stock paid for in money and how
191 much of it represents bond or other indebtedness, for which securities would have to be given, so that the court can form an idea of the responsibility of the company, in actions for damages to persons who might be injured by it, after you have provided by mortgage or other proper security for all of the debts which either heretofore or hereafter are to be given as liens upon the road?
A. The $300,000 have been paid in as stock; the road has been mortgaged for a million of dollars.
5 Re-X Q. That is, a mortgage has been executed for a million of dollars, and the trustee will issue bonds under that mortgage up to that amount?
A. Yes, sir.

6 Re-X Q. But a million dollars' worth of bonds have not actually been sold under the mortgage, up to date?
A. Not that I know of.

General question by the EXAMINER:

Do you know or can you state any other matter or thing that may be of benefit or advantage to the parties to this suit or either of them, or that may be material to the subject of this, your examination, or the matters in question between the parties; if yea, state the same fully and at large in your answer?
A. No, sir.

The signing of his depositions is waived by agreement of the solicitors for the respective parties.

L. N. FREDERICK, recalled by consent of counsel.

Direct examination.

Mr. SEMMES:

1 Q. What position did you occupy in the railroad when the double tracks were laid upon North avenue between McCulloh street and Guilford avenue?
A. I was secretary and treasurer of the company at that time and manager of the road.
2 Q. You are aware that under agreement, the terms of which were fixed by the mayor and city commissioner, that this railroad took up the tracks upon North avenue and entered into an agreement with the Union railroad for the use of its tracks between the points designated. Are you able to tell what was the cost to this road of laying those independent tracks and taking them up and paying its proportion for the tracks of the Union road under this contract?

Mr. BRYAN: I object to the question as entirely irrelevant.

A. The cost of the tracks on North avenue from McCulloh street to Guilford avenue, which were laid by E. D. Smith & Son, was $22,120.69. The cost of removing these tracks, our outside tracks, on North avenue from Madison avenue to Guilford avenue, was $12,276, and the North Avenue Railway Company, under an agreement with the mayor, was to pay one-half of that cost, which
192 was $6,138. Now as to the cost, paying one-half the cost of the Union Passenger railway tracks there, I will say that that is a disputed account; the Union road claims that we owe them one-half of $34,000, while we claim to owe them one-half of $24,000.
3 Q. Can you tell, Mr. Frederick, what was the net loss to this company, by this change brought about by reason of this agreement?

Mr. BRYAN: Objected to.

A. The net loss to the company, I should say, was the costs of putting down the tracks and our proportion of the costs of taking it up, which was $6,000, and $22,000 for putting it down, makes $28,000; less the value of the old material, which is worth $5,000; that is all we have been offered for it, and that only in trade; so that the net cost to the North Avenue Railway Company, from the change in that track, was $28,000; that does not, of course, include the overhead construction; that I am not able to give.

4 Q. And that does not include, as I understand it, the half that you had to pay or will have to pay to the Union railroad?

A. No, sir; and there is another view of that question, and that is this; that we had an independent track of our own at that time, while we now have a track jointly with the horse-car line, which interferes some with the running of our cars.

General question by the EXAMINER:

Do you know or can you state, any other matter or thing that may be of benefit or advantage to the parties to this suit, or either of them, or that may be material to the subject of this, your examination, or the matters in question between the parties; if yea, state the same fully and at large in your answer?

A. No, sir.

The signing of his depositions by this witness is waived by agreement of the solicitors for the respective parties.

J. K. DIFFENDERFFER, a witness of lawful age, produced on behalf of the plaintiff, being duly sworn on the Holy Evangely of Almighty God, deposes and says, as follows:

Direct examination.

By the EXAMINER:

1 Q. State your name, residence and occupation.

A. J. K. Diffenderffer; 28 years old; Walbrook Park; my profession is mechanical engineer.

2 Q. Do you know the parties to this suit?

A. Yes, sir.

3 Q. Mr. Diffenderffer, will you look at this plat, which is marked Plaintiff's Exhibit No. 7, and state what you know about it? (Handing witness plat.)

A. (After inspection.) This plat was made by myself from measurements taken along the streets, and is correct to the best of my knowledge.

193 4 Q. Does it represent the way that the tracks have been constructed upon Lexington street by the Lake Roland Elevated Railroad Company?

A. Yes, sir.

5 Q. Will you please look at the paper, marked Plaintiff's Exhibit No. 8, and state whether that represents the location of the railroad tracks on Lexington street, between North and Calvert? (Handing witness plat.)

A. (After inspection.) It does.

6 Q. Please state what, if anything, you know about the endorsement which appears upon this plat, Plaintiff's Exhibit No. 8?

A. This endorsement was placed on there after a conversation which I had with Mr. Smith, general manager of the road, at Mr. Duval's office. Mr. Duval, Mr. Frederick H. Smith, Mr. Joseph P. Smith and myself were present. I had submitted a plan which showed tracks a little further from the post-office sidewalk, and after talking it over, Mr. Smyrk said to leave this plat with him and he would talk with the mayor and let me know. I did so, and in a day or so, when I next called on him to find out his decision, he told me to submit a plat that showed the tracks a little closer to the sidewalk, and as near as we could get to the gutter without damaging it, and thereupon I made this plat and submitted to him, and after a day or so, he approved it.

7 Q. Do you know about when it was that he placed his approval upon that plat?

A. Well, it was about November 3rd or 4th.

8 Q. Was there anything said at that time in reference to the tracks upon the rest of Lexington street between Calvert and Charles?

A. This block between North and Calvert was the only block we proposed to shift the tracks on to escape some sewer manholes and telephone manholes along there, and at the time I spoke about putting the reversed curve in and going back to the centre of the street above Calvert street.

9 Q. Back to the centre of Lexington street?

A. Back to the centre of Lexington street above Calvert, and this was understood clearly, and in fact shown on this plat which he approved.

10 Q. Do you know whether any action was taken in the office of the city commissioner as to establishing the grade of Lexington street beyond Calvert; west of Calvert?

A. Yes, sir. On the 7th of November, I think it was, I went to Mr. Duval's office and asked him to give us grade up Lexington street, as we proposed to tear up the street and put down the double tracks, the next day, which was the eighth. His assistant went out late that afternoon and put some pegs in, took some elevations and finished the next morning.

11 Q. Now is there any objection, physical objection, to placing the tracks of the elevated railroad in the same comparative
194 location, as to the curb line, on the square between Calvert and St. Paul, as they were placed on the square between Calvert and North?

Mr. BRYAN: Objected to.

A. None at all.

11 Q. What buildings occupy that square—that is the square on Lexington street between Calvert and St. Paul on the south side?

Mr. BRYAN: Objected to.

A. The court-house and the Record building.

13 Q. Have you measured the distance of the court-house, as it now stands, from the curb line on Lexington street?

A. The distance to the court-house from the curb line is twenty-three and six-tenths feet.

14 Q. What is the distance of the Record building from the curb line?

A. It is about the same.

15 Q. Have you made any measurements of other streets in the city where there are double tracks?

A. Yes, sir.

10 Q. Will you please state some of the streets where a double track exists, and which you have measured.

Mr. BRYAN: Objected to.

A. Well, there is one place on Lombard street, right at the custom-house, where the tracks of the Baltimore Traction Company come 4 feet from the curb on the north side, and it leaves about ten feet and some inches on the south side, and on Lombard street again from Concord street to West Falls avenue, where the tracks are an average of 5 feet from the curb, and Lombard street east of the bridge, from the bridge to Exeter street, where the tracks are arranged from 4 feet to 7 feet from the curb; Pratt street from Exeter to Central avenue again, where the tracks average six and eight-tenths feet from the curb; on Aisquith street from Baltimore street to Laurel, a distance of 190 feet, the tracks are only 3 feet from the curb on the one side, leaving ten feet on the other, and on Exeter street from Baltimore street north to Fayette there is a double track placed leaving only four and nine-tenth- feet on each side from the curb line to the tracks, while in this block there is also a rebutt, where the gutter stones are placed 13 inches from the curb and a sliding pavement running from the curb down to the gutter.

17 Q. Look at Exhibit No. 14, and state whether that represents the measurements.

A. That plat is correct as far as the width of the streets go; there are no tracks on there.

18 Q. Do you know the distance from the bridge to where this plat bends out on Gay street?

A. I think it is 3 blocks.

195 19 Q. You do not know the exact distance?

A. No, sir.

20 Q. Will you be kind enough to measure that distance from the bridge to that point and furnish it to me?

A. Yes, sir.

Mr. SEMMES: You will let that go in?

Mr. BRYAN: Certainly.

21 Q. Do you know what the grade of Lexington street is west of Calvert?

A. It is about a 6 % grade, which means 6 feet to the hundred.

22 Q. How does that grade compare with grades on other streets;

I mean by that is it a steep or a moderate grade as compared with other grades in the city?

A. Well, it is a pretty steep grade.

23 Q. What course does Lexington street take west of Charles, compared with Lexington street east of Charles?

A. It goes on an angle to the north, but I have not measured the angle.

24 Q. Is it the same width on the east side of Charles street as it is on the west side?

Mr. BRYAN: Objected to as irrelevant.

A. It is about the same.

Cross-examination.

Mr. BRYAN:

1 X Q. You have been asked about plats, Exhibits Nos. 7 and 8, the blue print; they do not represent the tracks as they now are there; I mean there is no track actually laid around the corner of Lexington street as shown on the plat, and there is no track across the tracks of the Blue line as is shown on the plat?

A. No, sir; but these things are ordered according to the plans to go in there.

2 X Q. What I wanted to know was the actual condition of your track now, as I understand this, your track does not extend to the corner of North street and there is no curve laid around there; that your track does not cross Lexington street, and there is no track crossing there at this particular time; is that so?

A. That is so.

3 X Q. How long have you lived in Baltimore?

A. Something like 26 years.

4 X Q. Can you tell whether or not on every street south of Lexington street, until you get to the water, there are railroad tracks at the present time? I mean every track parallel with Lexington street.

A. Water street is the only one there are no tracks on.

196 5 X Q. But is not Water street a very narrow street, which only runs a very short distance?

A. It is not a narrow street, but it does not run all the way through.

6 X Q. How far does it run?

A. It runs through to Light street.

7 X Q. How far the other way?

A. To the falls; it is called Second street below South.

Mr. SEMMES: It is called Water street now.

A. Well, it runs to Jones' falls.

8 X Q. You would not wish to be understood as calling that in any sense a thoroughfare?

A. But it is quite a thoroughfare.

9 X Q. You do not mean to say that people coming from East to West Baltimore would use Water street as a thoroughfare?

A. Well, no.

10 X Q. Are you certain that Water street extends as far east as the falls?

A. Yes, sir.

11 X Q. How wide is Water street?

A. I think the average width of Water street is 36 feet; I should imagine so.

12 X Q. The court-house, you told us, is on Lexington street, between Calvert street and St. Paul. Is not the main entrance to the court-house on Lexington street?

A. Well, there are two entrances; one on Court-house lane and one on Lexington street; they are both used about the same.

13 X Q. You don't want to be understood as saying that the main entrance to the court-house is not on Lexington street, do you?

A. Well, I mean that the two entrances are used about the same.

14 X Q. If you were asked which was the main entrance to the court-house, the one in the little alley called Court-house lane or the one on Lexington street, you would say that you did not know?

A. The main entrance is on Lexington street.

15 X Q. Don't you know that it is now, and has been for a number of years, more years than you or I can remember, the custom to bring the prisoners in the jail van to the Lexington-street entrance, and take them up the high flight of iron steps there into the criminal court in that way?

A. Yes, sir.

16 X Q. Do you know how wide the jail van is?

A. No, sir.

197 Mr. SEMMES: I only want to have the privilege of obtaining these measurements from Mr. Diffenderffer.

Mr. BRYAN: That is all right.

17 X Q. Did you not have to guess at a number of measurements and directions that you gave in your testimony, because you had no correct data before you?

A. Now, with the exception of the streets, in which I measured the tracks and got the distances from the curb to the rail; those I measured myself.

18 X Q. Now, about the grade on Lexington street; you do not mean to say that the city commissioner change- the grade in any way of your road; you merely mean that one of his assistants put pegs there so that you would know what the grade was, as originally fixed, when you finished laying your tracks; is that so?

A. Yes, sir; that is so.

General question by the EXAMINER:

Do you know or can you state, any other matter or thing that may be of benefit or advantage to the parties to this suit, or either of them, or that may be material to the subject of this, your examination, or the matters in question between the parties; if yea, state the same fully and at large in your answer?

A. No, sir.

The signing of his depositions by this witness is waived by agreement of the solicitors for the respective parties.

The taking of the testimony was then adjourned to the 23rd day of December, 1892, at 2.30 o'clock in the afternoon, and same place, at which last-mentioned time and place I attended for the examination of witnesses, due notice of such meeting having been given, and in the presence of the solicitors for the respective parties, I proceeded to take the following depositions; that is to say:

R. KEITH COMPTON, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By the EXAMINER:

1 Q. State your name, age, residence, and occupation.

A. R. Keith Compton; 23 years of age: I reside here in the city of Baltimore; my occupation is civil engineer, in the employ of the city, as engineer in the city commissioner's department.

2 Q. Do you know the parties to this suit?

A. Yes, sir.

Mr. BRYAN:

3 Q. At Captain Smyrk's request, or at my request either, did you make any measurement of the width of different clas-es of vehicles used in this city?

A. Yes, sir.

198 4 Q. Did you also make any measurements of the width of the tracks of the Lake Roland Elevated railway on Lexington street?

A. Yes, sir.

5 Q. Can you tell us what is the width of the different vehicles used in this city, from hub to hub?

A. One of the Washington Express wagons measures 6 feet 5 inches from hub to hub, and a one-horse four-wheel wagon, 6 feet 3 inches; one-horse carriage, 6 feet 1 inch; a hack measures 6 feet 3 inches; Adams Express wagon measures 6 feet 4½ inches; three-horse furniture van measures 7 feet 6 inches. They are all the measurements taken from hub to hub.

6 Q. What other measurement did you take?

A. The three-horse furniture vans, measures from out to out of horses; they take all of a space 8 feet 4 inches.

7 Q. That is where you have three horses abreast?

A. Yes, sir. Now from out to out of swingle trees of these three-horse vans, they measure the same as the horses, 8 feet 4 inches; they take the same space. We measured a coal cart from hub to hub, and that measures 6 feet 8 inches. One of Hitchin's transfer wagons measures 7 feet 4 inches from hub to hub. Now, then, we measured the Central railroad electric cars from out to out, and they take a space of 7 feet 9 inches.

8 Q. What else did you measure?

A. We measured the North-avenue cars and they measure 7 *foot* 3 inches.

9 Q. This is all on there?

A. Yes, sir; except the overhanging of the different cars and everything.

10 Q. How far does the North-avenue car overhang on each side?

Mr. CARTER: Overhang the rail, you mean?

Mr. BRYAN: Yes, sir; overhang the rail.

A. The North-avenue car overhangs 11¼ inches.

11 Q. What does the other electric car overhang?

A. The Central cars overhang 1 foot 2½ inches.

12 Q. Can you tell what is the distance from the curb line to the nearest track of the Lake Roland Elevated railway track on Lexington street, as they are now laid between Charles and St. Paul street?

A. Now, from the south curb there to the south track it is 7 feet 1¾ inches.

13 Q. What is the distance from the curb line to the point where the car will overhang?

A. It is 5 feet 11⅝ inches, the same size of the car.

14 Q. What are the same distances in the square between St. Paul and Calvert street?

A. There at the corner of St. Paul street, the distance from the curb line over to the track is 6 feet 7¼ inches; where it overhangs from the curb over to the side of the car it is 5 feet 5⅛ inches.

199 15 Q. And the same distances between Calvert and North streets?

A. Now, there it is 2 feet 9⅞ inches over to the rail and 1 foot 7¾ inches to the side of the car.

16 Q. What is the distance on the north side of Lexington street between the side of the car and the track, respectively, between St. Paul and Calvert streets?

A. It is 6 feet 2¼ inches from the curb over to the track, and 5 feet ⅛ inches to the side of the car.

17 Q. Now on the north side between St. Paul and Charles street?

A. It is 7 feet 6¼ inches from the track over to the curb, and it is 6 feet 4⅛ inches from the side of the car over to the curb.

18 Q. When you have measured to the curb, you have included in the distances, that you have given there, the whole of the gutter, have you not?

A. Yes, sir.

19 Q. So that, for example, if a carriage was to occupy 6 feet 4¾ inches on Lexington street between St. Paul and Charles, it would have to take up the whole of the gutter so as to be able to clear the car?

A. Yes, sir.

20 Q. Have you made a rough plat which shows these distances, and if so, will you please file it with the examiner, marking the same Defendant's Exhibit Examiner R. K. C., No. 1?

A. Yes, sir.

21 Q. Are you acquainted with the different daily journals that are published in Baltimore?

A. Yes, sir.

22 Q. Will you please look at the paper now handed you, and state if you know what it is and of what date it is an issue?

A. It is the Baltimore Sun of November 4th, 1892.

23 Q. Please look at the paper now handed you and say what that is.

A. The Baltimore Sun, Saturday morning, November 5th, 1892.

24 Q. And please tell us what this is (handing witness paper).

A. (After inspection.) The Baltimore Sun of Tuesday morning, November 8th, 1892.

NOTE.—The newspapers identified by witness are herewith filed with the examiner, marked respectively Defendant's Exhibit Examiner R. K. C., Nos. 2, 3, and 4.

25 Q. Can you tell whether or not the Sun is a journal of general circulation in the city of Baltimore?

A. Yes, sir.

28 Q. How does it compare in circulation with other papers?

A. Compares very favorably.

200 27 Q. I mean, has it a larger circulation than any other paper or not, if you know?

A. Well I expect it has a larger circulation than any other.

NOTE.—The paper referred to by the witness, giving the measurement of wagons, etc., is herewith filed with the examiner, marked Defendant's Exhibit Examiner R. K. C., No. 5.

Cross-examination.

Mr. CARTER:

1 X Q. On Charles street from Baltimore up to beyond Saratoga, how is the street paved at the curb; that is how is the gutter arranged?

A. Well it has one of those blocks in there, those gutter blocks right up against the curb, to the best of my knowledge.

2 X Q. So that the wheels of vehicles can be placed immediately next to the curb, can they not?

A. Yes, sir; that is the idea, exactly.

3 X Q. What is the *guage* of cabs, if you know; cabs and buggies and light vehicles?

Mr. BRYAN: If he has measured them, don't guess at it; if you know, tell?

A. Well, I don't know that. I don't know what the standard gauge is of a buggy.

4 X Q. You have not measured that class of vehicles before testifying today, have you?

A. Well, now, yes, sir; I measured a buggy down there in front of the city hall and that measured 6 feet, one inch from hub to hub; yes, sir, but that was a very narrow buggy.

5 X Q. Have you measured or do you know the gauge of drays?
A. Yes, sir.
6 X Q. What are they?
A. I don't remember; I had them on a slip of paper; I measured it, but I haven't it here; to the best of my knowledge it is 6 feet 7 inches; the same as a coal cart.

General questions by the EXAMINER:

Do you know or can you state any other matter or thing that may be of benefit or advantage to the parties to this suit, or either of them, or that may be material to the subject of this, your examination, on the matters in question between the parties; if yea, state the same fully and at large in your answer?
A. No, sir; I don't think I have anything more to say.

The signing of his depositions by this witness is waived by agreement of the solicitors for the respective parties.

P. HANSON HISS, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct examination.

By the EXAMINER:

1 Q. State your name, age, residence, and occupation?
201 A. P. Hanson Hiss; 217 N. Charles street; furniture manufacturer and decorations.
2 Q. Do you know the parties to this suit?
A. Yes, sir.

Mr. CARTER:

3 Q. Near what street is your place of business?
A. Near Lexington street; on Charles street between Lexington and Saratoga, on the east side.
4 Q. What size warehouse and manufactory have you there on Charles street?
A. Our front is 30 by 148 feet, and then we have a factory in the rear 40 by 66 feet.
5 Q. Do you carry on a large business there?
A. We do.
6 Q. How long have you been located at that place?
A. We have been there 22 years.
7 Q. The tracks of the North Baltimore Passenger railway, now belonging to the Baltimore Traction Company, are now located on Charles street opposite your place of business, as has already been testified in this case. How many years have they have been there; do you know?
A. That I cannot state; I suppose 10 or 15 years. I suppose that. I don't know.
8 Q. Please state whether, in your judgment, the presence of these

tracks on Charles street are any interference with the reasonable use of Charles street for public travel?

A. No, sir.

9 Q. Do you represent any property situated on Lexington street between Charles and St. Paul. If so, on which side of the street, and about what front is it?

A. We represent house No. 6, E. Lexington street, on the north side of the street; it is 25 feet front.

10 Q. How is the building occupied?

A. As offices; the Greenmount cemetery office is on the ground floor.

11 Q. Is it occupied upstairs?

A. Yes, sir; all offices; lawyers' office and property agents, and so forth.

12 Q. For what purposes are the buildings on Lexington street between Charles and Calvert, principally occupied?

A. Office buildings.

13 Q. Principally lawyers' offices, are they not, and real estate?

A. Lawyers and real estate agents, yes, sir.

14 —. In your judgment would the operation of the Lake Roland Electric railway, with a double system of tracks on Lexington street, between North and South, interfere with the reasonable use of that street for the purpose of public travel?

A. Not in the least, but would be a great benefit.

202 Mr. BRYAN: Question and answer objected to.

Cross-examination.

Mr. BRYAN:

1 X Q. Where do you live, Mr. Hiss?

A. I live at 2201 Maryland avenue, corner of Twenty-second street.

2 X Q. How far is that from North avenue?

A. About 4 squares, I think.

General question by the EXAMINER:

Do you know or can you state any other matter or thing that may be of benefit or advantage to the parties to this suit or either of them, or that may be material to the subject of this, your examination, or the matters in question between the parties? If yea state the same fully and at large in your answer.

A. No, sir.

The signing of his depositions by this witness is waived by agreement of the solicitors for the respective parties.

JAMES H. SMITH, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By the EXAMINER:

1 Q. State your name, age, residence and occupation?
A. James H. Smith; 2449 Maryland avenue, Baltimore.
2 Q. Do you know the parties to this suit?
A. Yes, sir.

Mr. BRYAN:

3 Q. Are you a lawyer and member of the bar in this city?
A. Yes, sir; I am, sir.
4 Q. Were you a member of the city council which passed ordinance No. 1, which was approved on November 18th, 1892, in regard to the tracks on Lexington street; I mean the ordinance which prohibited their having a double track there?
A. I was.
5 Q. Did you know of the existence of this ordinance before the council met that night on which it was passed; the first night of the session?
A. I did, sir.
6 Q. Had you considered the question, so as to be able, in your judgment, to act intelligently upon it that night?
A. I had.
7 Q. Would you mind stating how you voted on that ordinance?
A. I voted in favor of it, sir.
203 8 Q. Can you tell whether or not any amount of subsequent reflection would have caused you to vote in any other way?
A. It would not. If it were presented now, with what I have seen, it would only strengthen my opinion in favor of it and I should vote for it again.
9 Q. Will you tell the examiner whether or not you consider a double system of tracks, laid as those tracks are on Lexington street, a detriment, or otherwise, to the public travel on this street?
A. Yes, sir; I consider that a double track there, with the cars running at short intervals, would practically drive all other travel off the street, surrendering the street to railroad travel.
10 Q. Are you familiar with the streets in Baltimore, between the water and Lexington street?
A. I have a general knowledge of them, yes, sir.
11 Q. Do you know whether there are railroad tracks on Pratt street?
A. There are.
12 Q. Are there railroad tracks on the next street, Lombard street?
A. There are.

13 Q. Are there railway tracks on German street, the next street?

A. There are.

14 Q. Are there railway tracks on Baltimore street?

A. Yes, sir.

15 Q. And are there railway tracks on Fayette street?

A. Yes, sir.

15 Q. Then Lexington street is the next street, is it not?

A. Yes, sir.

16 Q. So that if double tracks are placed on Lexington street, every street between the water and Lexington street would be covered with tracks; is that so?

A. Yes, sir.

17 Q. How long have you been a member of the city council?

A. This is the fourth year.

18 Q. Do you know what was the cost of opening Douglas street?

A. I cannot recollect now, sir; that was before I was a member of the council.

19 Q. Do you know whether or not Lexington street, by connecting with Douglas street, makes a thoroughfare from the eastern to the western city limits?

A. Well, I know that that was the argument used in regard to the opening of Douglas street.

20 Q. I show you Defendant's Exhibit- Nos. 1 and 2 and ask if you can tell whether they correctly state the proceedings of
204 the council on the first day of the session; so far as your branch is concerned, at least?

A. I would suppose so, sir. Without examining them, they appear to. They bear the name of the chief clerk and are in the form in which the official journal is kept. That is the usual form, such as we receive as soon as they are made up.

Cross-examination.

Mr. CARTER:

1 X Q. Do you know the width of Charles street, from Baltimore street to Mulberry, as compared with the width of Lexington street, between North and Charles?

A. I do not in feet, sir.

2 X Q. Is it your belief that Charles street, between Baltimore street and Mulberry, is any wider than Lexington street, between Calvert and North, or between St. Paul and Charles?

A. I should think from observation, not, sir.

3 X Q. You are aware, are you not, that for at least 15 years past Charles street, from Baltimore street to Mulberry, and beyond, has been occupied by a double set of passenger railway tracks, on which the North Baltimore Passenger railway cars have been operating, are you not?

A. I am, sir.

4 X Q. Is Charles street a great thoroughfare, between Baltimore and Lexington street?

A. It is, sir.

5 X Q. Has the presence of these two tracks on Charles street, which I have mentioned, and their operation as a city passenger railway, driven the travel off of Charles street?

A. I think to some extent, it has, sir.

6 X Q. Where has it driven it?

A. On to Lexington street; Lexington street has become quite a thoroughfare.

7 X Q. But Lexington street runs at right angles with Charles street. How then can the travel that would otherwise *would* have gone on Charles street from Baltimore up to Saratoga be accommodated on a street that runs at right angles with it.

A. By going into another street at right angles with it, a square away.

8 X Q. Which street is that?

A. Calvert street is two squares away.

9 X Q. Calvert street has been occupied during that same length of time, and for a longer time, by a double set of tracks, on which is operated a horse railway?

A. Yes, sir.

10 X Q. Then how would the fact of two sets of tracks on Charles street have the effect of driving the travel from that street on to Calvert street, which has the same number of tracks?

A. If you met with a blockade on one street and had the means of access on another street, you would have two chances of overcoming the blockade, if that street was constructed.

205 11 X Q. Do you not know the fact that Calvert street is a great deal more subject to blockade than Charles street?

A. I do not.

12 X Q. Do you not know that Calvert street, from Baltimore street north, is one of the most crowded thoroughfares in the city of Baltimore?

A. My observation has been that it is not more so than Charles street, from Baltimore street north, or Baltimore street south.

13 X Q. Then Charles street, in your observation, is one of the most crowded thoroughfares in the city of Baltimore?

A. Yes, sir.

14 X Q. And has been so crowded during all these years that this city passenger railway has been on it; has it not?

A. True, sir.

15 X Q. Now, will you be kind enough to state on what basis the judgment you expressed in one of the first questions asked you on the direct examination, that if the cars were put on Lexington street with the double track, that nearly all of the travel would be driven off of that street, is founded, when you now confess, that notwithstanding the double tracks on Calvert street and Charles street, for this large number of years, the travel, so far from being driven off from them, has remained, so that these two streets are two of the most crowded thoroughfares in the city of Baltimore?

A. The answer to that, sir, would be this: that the difference between a horse railroad and an electric road or cable road is very

different; the horses are not used to cable cars, and while there are two tracks on Charles street, even if the horse railroad is objectionable, in my judgment, yet, because they go there, I see no good reason why the same evil should be multiplied on other streets.

16 X Q. Are you aware that the Baltimore Traction Company, that now owns the tracks on Charles street, are about to put electricity on that line?

A. I am, sir.

17 X Q. Do I understand you then to express the judgment that any street of the width of Lexington street, between Charles and North street, could not have two tracks on it, the cars of which are to be propelled by cable or electricity?

A. I do not mean to say that, sir; I mean to say that there are certain streets, in my judgment, and especially in a section like Lexington street, close to the city hall, and close to the court-house, that ought to be preserved for the driving public, and not all the streets of the city surrendered for railroad purposes.

18 X Q. Well, did you vote for the ordinance which authorized the Baltimore City Passenger railway to use the narrow part of Gay street, near the bridge, for the purpose of having two tracks on it, the cars to be propelled by cable?

A. I did, after it was understood that the street was to be widened.

206 Mr. BRYAN: Question and answer both objected to as not relevant to this inquiry.

19 X Q. One of the streets that you have mentioned in your examination-in-chief, running parallel with Lexington street, is Fayette street; that has one railway track upon it from Howard street to North, has it not?

A. Yes, sir.

20 X Q. Are you aware that Fayette street is now in the process of being widened?

A. Yes, sir.

21 X Q. What width will it have when so widened?

A. I don't know, sir.

22 X Q. Where Lexington street crosses Charles street and extends westward, do you know what the width of the street is from Charles street westward to Liberty street?

A. I don't know in feet.

23 X Q. Is it not much narrower than it is between Charles and North street?

A. It is narrower than it is between Charles and Calvert I think, and perhaps between Charles and North.

24 X Q. Well, isn't Lexington street between Calvert and North as wide as any part of Lexington street between Charles and North?

A. I think it is; the narrow part is between Courtland and Calvert streets.

Mr. SEMMES:

25 X Q. Lexington street, after it crosses Charles, what course does it take?

A. It takes a northwesterly course.

26 X Q. It does not continue then straight on?

A. No.

27 X Q. But goes up at an angle to the northwest?

A. Yes, sir.

General question by the EXAMINER:

Do you know or can you state any other matter or thing that may be of benefit or advantage to the parties to this suit or either of them, or that may be beneficial to the subject of this, your examination or the matters in question between the parties? If yea, state the same fully and at large in your answer.

A. I do not know anything.

The signing of this depositions by this witness is waived by agreement of the solicitors for the respective parties.

WM. P. TWOMLEY, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By the EXAMINER:

1 Q. State your name, age, residence and occupation?

207 A. Wm. P. Twomley, 102 E. Lexington street, Baltimore, surveyor.

2 Q. Do you know the parties to this suit?

A. Yes, sir; some of them.

Mr. BRYAN:

3 Q. Did you make a map or plat of Lexington street between Charles and St. Paul and St. Paul and Calvert and Calvert and North for me?

A. I did.

4 Q. Please state if that map is marked Defendant's Exhibit No. 3.

A. That is the plat.

5 Q. Please state whether, so far as your skill goes, it is an accurate and correct map?

A. It is an accurate and correct map, with this exception, that I have shown the tracks as though they extended to North street, whereas the tracks were not yet laid east of a point about 30 feet west of North street; they do not extend beyond this point, but I ran them right through as though they would be, if they were laid, in a straight line.

6 Q. Can you tell how far it is from the outer edge of the gutter to the outer projection of the car on Lexington street between Charles and St. Paul; I mean of course the projection of the car on the side nearest that gutter?

A. It is 4 feet 7 inches at Charles street and Lexington, and at St. Paul street and Lexington it is the same, 4 feet 7 inches.

7 Q. How far is it from the outer edge of the curb to the outer projection of the car at Charles street?

A. Six feet one inch; from the outer edge of the gutter to the outer edge of the car was 4 feet 7 inches.

8 Q. The gutter then is 18 inches in width?

A. Yes, sir.

9 Q. How did you find what the projection of the car from the rail would be?

A. I asked the city commissioner how far the cars would project from the outer edge of the rail, and he informed me 15 inches.

10 Q. You then allowed 15 inches for that projection?

A. I then allowed 15 inches for that projection.

11 Q. And the distance between the outer rail of the car and the curb or gutter respectively would be 15 inches more than the distance you have given as from the outer projection of the car to these points?

A. Exactly.

12 Q. What is the distance from the other projection of the car to the outer curb on Lexington street, between St. Paul and Calvert? At St. Paul street first.

A. At St. Paul street the distance is from the gutter 3 feet 8 inches, and to the curb 5 feet 2 inches.

208 13 Q. Now, at Calvert street, what is it?

A. At Calvert street to the gutter it is 5 feet 10 inches, and 5 feet 2 inches to the curb.

14 Q. Now, on Lexington street, between Calvert and North, please give us the same distances?

A. I was going to state, Mr. Bryan, that I am giving these distances on the south side of the street; they vary on the north side.

15 Q. Now give us the distance on the south side of Lexington street, between North and Calvert?

A. At Calvert street the distance of the gutter extends one inch beyond the projection of the car; the car projects over one inch to the outside edge of the gutter, and the distance to the curb from the outside projection of the car is 14 inches.

16 Q. Now give us the next corner?

A. Now I will give you a point possibly 30 or 40 feet west of North street, because the track is not laid at North street, and there the same state of affairs exists as at Calvert street.

17 Q. And the same measures?

A. Yes, sir.

28 Q. Now on the north side of Lexington street, between Calvert and North?

A. On the north side, at Calvert street, from the outside projection of the car to the outside edge of the gutter is 8 feet 2 inches, and to the curb is 9 feet 8 inches, and at a point about 30 feet west of North street, from the outer edge of the car to the outer edge of the gutter, is 8 feet 10 inches, and to the curb is 10 feet 4 inches.

19 Q. Now on the north side, between St. Paul and Calvert street?

A. At Calvert street the distance from the outside projection of the car to the outer edge of the gutter is 3 feet 4 inches, and to the curb 4 feet 10 inches, and at St. Paul street the distance is 3 feet 4 inches, and to the curb 4 feet 10 inches, the same.

20 Q. Now, on the north side, between Charles and St. Paul?

A. At St. Paul street the distance is 4 feet 7 inches from the outer projection of the car to the outer edge of the gutter, and 5 feet 10 inches to the curb, and at Charles street it is 4 feet 4 inches from the car to the outer edge of the gutter, and 5 feet 10 inches to the curb.

21 Q. Have you seen the tracks as actually laid on Lexington street?

A. I have.

23 Q. Are you acquainted with the uses to which Lexington street is put by the public?

A. Yes, sir.

209 23 Q. Will you tell the examiner, whether, in your opinion, double tracks there are detrimental to the public convenience and to the uses of the street by vehicles?

A. I think it would be.

24 Q. Is the gutter on Lexington street, between Calvert and Charles, right down from the curb, or does it slant outward?

A. Oh, yes, sir; it drops and it slants outward. It is not vertical but it slants outward.

25 Q. And, therefore, if a vehicle was to be driven close against the edge of the curb one of the wheels would have to be, not in the part of the gutter where the water runs, but on the slant between the edge of the gutter and the edge of the curb?

A. If it was driven between where the little flagging is made, off the curb; I don't recollect whether there is a flag at that point or not. In some gutters there is a little piece of flagging, possibly 7 inches in width, and it is generally laid flat; now, if it should be driven between that and the curb, of course it would have to go on an incline plain.

Cross-examination.

Mr. CARTER:

1 X Q. You are familiar with the condition of Charles street from Baltimore street northward, are you not?

A. Yes, sir.

2 Q. You know the fact, do you not, that Charles street, in this portion of it, is so paved that the gutter is vertical, and that the wheels of vehicles occupy places immediately in juxtaposition to the curb, and yet rest on a perfectly flat surface, do they not?

A. I don't remember whether from the curb to the gutter it is vertical or whether it is an incline plain.

3 X Q. You do not recollect that on Charles street?

A. No, sir.

4 X Q. You do know, though, do you not, that in all the improved pavements that are laid in the city of Baltimore, the mode of construction indicated in the last question which I have asked, is that which is adopted, do you not?

A. Yes, sir.

5 X Q. You have said that you think that the double tracks on Lexington street would be detrimental to the use of that street. Do you know the fact that Charles street, southward from Baltimore street and northward from Baltimore street, as far at least as Lexington street, is a greater thoroughfare and much more travelled than Lexington street, between North and Charles?

A. I think it is more travelled than Lexington street is at the present time, but I believe that the travel on Lexington street will be increased when Douglas street is completed with the bridge, giving an open way through to the east; I believe that the traffic up Lexington street will be much greater then than it has been heretofore.

210 6 X Q. Do you not believe that the widening of Fayette street, which is now going on, will make a large portion of the travel east and west then find accommodation on Fayette street?

A. It would, were not Lexington street, as I stated, being extended easterly, but that will more than compensate the traffic that would take Fayette street.

7 X Q. Now the grade of Fayette street from North street westward is a great deal better grade than the grade on Lexington street, is it not?

A. Since the Lexington-street grade has been changed, I don't know what the grades of the two streets are; I don't think it is a harder hill now than Fayette street is, but I think from Calvert street west to St. Paul on Lexington, the grade is about the same as it is from Calvert street west to St. Paul on Fayette.

8 X Q. Do you know that the grade on Lexington street from Calvert to Charles is a 6-foot grade; 6 feet in the hundred?

A. I don't know what it is.

9 X Q. Well, do you know that Charles street, from Baltimore street northward, is of the same width as Lexington street, between North and Calvert, and between St. Paul and Charles?

A. Why, I should think Charles street, from Baltimore street north, would be narrower than Lexington street, between North and Charles.

10 X Q. Well, do you not know the fact that there are two passenger railway tracks on Charles street, northward, beyond Lexington street, north of Baltimore street, and that these two tracks have been there and operated by a city passenger railway for some 10 or 15 years?

A. Yes, sir.

11 X Q. Do you know the fact that that railway now belongs to the Baltimore Traction Company and is about to be operated by electricity?

A. I have heard so.

12 X Q. Well, do you mean to say that the operation of an electric railway with a double set of tracks on Lexington street, between the points which I have given, which is, in your judgment, wider than Charles street, that the operation with a double set of tracks on Lexington street will be more disastrous than the same kind of a railway on Charles street, which you say is a greater thoroughfare, a narrower street?

A. No, I don't say that; I say it is disastrous on Charles street; I think it interferes with travel there, yes, sir.

13 X Q. Charles street——

A. (Interposing.) Is a narrower street.

14 X Q. And is now one of the most travelled streets in the city of Baltimore, in the portion I have mentioned, is it not?

A. It is; it has a great deal of travel over it.

15 X Q. Well, isn't the travel on Charles street both pleasure and business travel?

211 A. Well, it is more pleasure traffic, I should say; more carriage travel.

Mr. SEMMES:

16 X Q. Isn't it a matter of fact that the city is about to repave Lexington street, between North and Calvert?

Mr. BRYAN: That is objected to, as the only way to prove what the city can do is by looking at the ordinance.

A. I don't know whether they are going to repave it or not; they have paved it when they altered the grade; I believe they paved it from Calvert up to Charles; it was from Calvert street to Charles that they did repave it; from Calvert up to a point near Charles.

Redirect examination.

Mr. BRYAN:

1 Re-D. Q. Can you state whether or not Fayette street runs all the way through to the east as Lexington will run when connected with Douglas?

A. Oh, it will, surely; Fayette street runs away out to the county; it runs out on what they call the Philadelphia road.

General question by the EXAMINER:

Do you know or can you state any other matter or thing that may be of benefit or advantage to the parties to this suit, or either of them, or that may be material to the subject of this, your examination, or the matters in question between the parties? If yea, state the same fully and at large in your answer.

A. No, sir.

The signing of his depositions by this witness is waived by agreement of the solicitors for the respective parties.

JAMES L. MCLANE recalled for the plaintiff by consent of the counsel.

Direct examination.

Mr. CARTER:

1 Q. Testimony has been offered by the plaintiff in this case as to the width between the curb and railway tracks on Gay street, and on Lombard street, and so on. Will you state which is the more traveled street, Lexington street between North and Charles, or on the portion of Gay street and the portion of Lombard street, to which the question refers?

A. The portion of Gay street and the portion of Lombard street are very much more travelled than the portion of Lexington street. I think there is very little travel or traffic on Lexington street, beyond the number of buggies that go in and occupy the street, a good part of it, while the owners are in different offices. There is very little traffic on the street, passing up and down the hill. On Lombard street there is an immense deal of traffic. There is a great deal of hauling.

2 Q. What kind of traffic; just mention that?

A. Drays and trucks of all sorts. It is one of the most largely travelled streets, really, for all sorts of trucks for merchandise,
212 in the city. The portion of Gay street, I think, next to Baltimore street, I should say it was one of the most largely travelled streets in the city. There is a great deal of traffic on it all day.

3 Q. What have you to say in the way of the same comparison between Charles street, say between south of Baltimore and north of Baltimore?

A. Charles street, from German to Saratoga, is a very great thoroughfare for both pleasure carriages and trucks and wagons, and, I suppose you would call them vehicles of commerce of one sort or another, and that I think is due to the fact that it is the first north-and-south street—after leaving Calvert street, it is the first north-and-south street on a deliberate grade; besides being the direct route to the residential part of the city, and it is very much travelled.

4 Q. Are there on the portion of Charles street, north of Baltimore, houses occupied for purposes which require large wagons and vehicles to deliver goods to them?

A. There are several houses on Charles street north of Baltimore. There are several houses there which receive and deliver goods by the largest trucks known in the city, the large railway transfer trucks and wagons. Between Fayette and Baltimore there are two very large organ establishments and one very large sewing-machine establishment, that receive and send away freight by h e very largest trucks known in the city. They block the racks of the railroad constantly, and the cars stop and wait for them to load and unload, as they are obliged to do. That is a daily occurrence. There are several places between Lexington and Sara-

toga, on Charles, where the same large transfer wagons or trucks deliver goods daily.

Cross-examination.

Mr. BRYAN:

1 X Q. You do not mean, Mr. McLane, that the drays and trucks are habitually seen on Charles street?

A. I mean that it is a daily occurrence, and that the stoppage of travel is frequent.

2 X Q. You do not mean that drays and trucks go there in anything like the same proportion that pleasure carriages or vehicles for the delivery of purchases from stores go there, do you?

A. Well, I think there are probably a good many more pleasure carriages than heavy trucks and drays.

3 X Q. Well, you do not mean that there are anything like the same number of drays, or the same proportion of drays on Charles street, as is to be found on Lombard street, do you?

A. I think there are many more drays on Lombard street than on Charles street.

4 X Q. And the distinction between classes of traffic on Charles street and Lombard street is then that on Charles street the traffic is of a much lighter character?

A. I think the difference is that on Lombard street the vehicles consist entirely of vehicles of commerce and on Charles
213 street they have both pleasure carriages and vehicles of commerce, but from a familiarity of the streets having operated a railroad there for many years, the fact that the largest class of transfer wagons daily discharge at a number of the stores along between Baltimore and Saratoga streets was the subject of constant contention and the railroad people were constantly trying to prevent longer contention; that was inevitable, but it was a matter of daily occurrence because of the presence of these wagons.

5 X Q. As I understand, then, what you mean is this, that there are some 2 or 3 or 4 or 5, maybe, stores on Charles street, which, when they receive their goods, they have to have these large wagons come there?

A. No, I mean there are 8 or 10 active business stores there which receive their goods daily there.

6 X Q. Let me finish. You don't mean that these wagons are habitually seen on the street, going to and fro in the course of business; you only mean that there are, as you say, some 8 or 10 places at which these wagons, when these stores have bought goods, which have to be delivered, stop, just as an express wagon may stop at any other house in any other of the residential parts of the city?

A. No, it is just as wagons of that kind stop and deliver goods on that street; I mean it is a matter of daily occurrence. I have said that 8 or 10, but there are probably more; there are a number of stores which receive and send away. These organs are both received there and sent away from there. Large loads of sewing

machines are received and sent away, and the large trucks and large Adams Express wagons, the largest of these, visit these stores daily.

7 X Q. Can you recollect any occasion in your own experience when you have ever seen as many as 4 of these wagons at one time; if so, name the occasion.

A. No, I don't say that I have ever seen four.

8 X Q. At one time?

A. No, sir, one blocks the line, you know, and that does the mischief.

9 X Q. You know, do you not, that Lexington street has been opened from the western to the eastern portion of the city, by the opening of Douglas street, at an expense of nearly, if not quite, three-quarters of a million of dollars?

A. I know the general fact that it has been opened; I don't know what the expense was.

10 X Q. You know that it was a very great expense, though?

A. Yes, sir.

11 X Q. You were a city law officer, were you not, during the time when the thing was partly done?

A. I likely was; for it has been in process of opening a great many years. I don't think I ever had any connection with it as a city law officer, though; I don't think so.

214 12 X Q. And you are familiar, though, with the fact, are you not, that one of the chief arguments that was used for the opening of the street, one of the chief inducements pressed upon the city council, was that after the street was opened that there would be another outlet for the traffic from the east to the west, and that the congested condition of Baltimore street might be thus relieved?

A. I do not think I have any idea or any recollection of that argument until I have seen it repeated frequently since this controversy begun; I have no recollection of any argument connected with the opening of the street.

13 X Q. You have no recollection, then, on the subject?

A. I have no recollection of any argument for the opening of the street.

General question by the EXAMINER:

Do you know or can you state any other matter or thing that may be of benefit or advantage to the parties to this suit or either of them, or that may be material to the subject of this, your examination, or the matters in question between the parties; if yea, state the same fully and at large in your answer.

A. No, sir.

The signing of his depositions by this witness is waived by agreement of the solicitors for the respective parties.

FERDINAND C. LATROBE, a witness called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By the EXAMINER:

1 Q. State your name, age, residence and occupation.

A. Ferdinand C. Latrobe; attorney-at-law and mayor of the city of Baltimore; my residence is 906 N. Charles street.

2 Q. Do you know the parties to this suit?

A. Yes, sir.

Mr. BRYAN:

3 Q. Are you familiar with the location of the Lake Roland Elevated Railway tracks on Lexington St., at the present time?

A. I am.

4 Q. Can you tell whether or not you objected to these tracks being laid before they were laid?

A. I did.

5 Q. Will you please look at Defendant's Exhibit R. K. C., Nos. 2 and 4, being the Sun papers of Friday, November 4th and Saturday, November 5th, and after recalling your attention to the marked places on these papers; will you state whether on these dates the matters stated in these papers were published, and whether they truly stated what had occurred on the day previous to the publication?

A. I cannot fix the day exactly, because I don't remember the date; but this is what did occur, and I take it for granted
215 that this is the date they are published, and that that occurred the day before. I cannot swear it was November 3rd, but as that was published in the newspapers of November 4th, I presume it was November 3rd.

6 Q. Do you know what was the cost to the city of the opening of Douglass street, so as to make Lexington street a continuous thoroughfare from the east to the west?

A. The mere opening of the street cost about $350,000 to the city; that was the amount appropriated in the five-million loan for opening Douglas street. Now I think that is so *that is so;* it is so easily verified by turning to the ordinance, but that is my recollection, that it was $350,000 from the city. In addition to this the adjacent property-holders were assessed for benefits; I do not know exactly what that amount was. Mr. Carter drew the five-million loan, but it is my recollection that $350,000 was for Douglas street.

7 Q. Have you any idea of what the amount was that was assessed against the property-holders; was it equal to or greater than the amount against the city?

A. No; it was less than the amount against the city; I think it was somewhere about $200,000. I think the whole thing cost about $550,000.

8 Q. Do you know what the cost of paving and grading Douglas street was after it was opened?

A. I think the estimated cost of paving is $66,000. The grading, I do not know exactly what it cost. I could easily have ascertained if I had known these questions were to be asked, and have had all the figures here; I have them all at the city hall.

NOTE.—It is agreed that a statement can be prepared by the mayor and filed with the examiner, showing, first, the cost to the city of opening Douglas street; second, the cost to the property-holders in assessments for benefits; third, the estimated cost of the paving, such paving not having yet been completed; fourth, the cost of grading Lexington street; fifth, the cost of the bridge over Jones' falls at Lexington street; sixth, the cost of a piece of property at the corner of Charles and Lexington street, which was bought by the city for the purposes of straightening the street, and that such statement shall have the same effect as if testified to by him orally before the examiner.

9 Q. State, please, whether in your opinion, double tracks, as proposed to be laid by this company on Lexington street between North and Charles, will be injurious to public interest and detrimental to the use of the street?

A. Well, in my judgment it would; otherwise I would not have sent the message that I did to the council.

10 Q. Do you know whether or not the inducement was urged and pressed upon the city council that if Douglas street was opened so as to connect with Lexington street, there would be an additional thoroughfare from the eastern to the western portion of the
216 city, and whether or not that inducement was one of the things that weighed with the city authorities in passing the ordinance?

Mr. SEMMES: Note an objection.

A. Well, in my judgment the principal argument in favor of the opening of Douglas street was to give an additional eastern and western thoroughfare between the two sections of the city, West Baltimore and East Baltimore, and I think you will find that in several messages I sent to the council in that connection; to relieve Fayette and Baltimore streets; I do not know how far that weighed with the city council that passed the ordinance.

11 Q. But you do know that that was one of the things that was mentioned in that connection.

A. In my messages; I know that.

12 Q. Please state whether or not, in your judgment, the character of traffic on Lombard street, near the custom-house, is similar to that which is now open upon Lexington street, or to that which will reasonably be expected to be on Lexington street after Douglas street is paved and the street is thrown open to the public?

A. Well, on Lombard street, near the custom-house—that is, on Exchange place—I think that is undoubtedly one of the crowded thoroughfares of Baltimore; but if you refer to Lombard street beyond Gay, I don't think that can be considered a crowded thoroughfare. I don't suppose there is a busier place in Baltimore than

Exchange place, which is Lombard street in front of the custom-house, and that is one of the widest streets in Baltimore.

13 Q. But the question I asked was whether the character of the traffic—not the amount and volume—but the character of the traffic was the same there as it is now on Lexington street, or would reasonably be expected to be, after it is opened?

A. No; I think it is a different character of traffic on Lombard street, or Exchange place, from what would be on Lexington street. The traffic on Lombard street, or Exchange place, consists of every kind of drays and trucks and traction roads, and half a dozen railroads around there, whereas on Lexington street, between Charles and North, the traffic is more of lighter vehicles.

14 Q. The one is of vehicles of a heavy character, and which are more apt to go in a walk or very slow trot, and the other is of lighter vehicles, which are supposed to go at a greater rate of speed?

A. One is more of a driving street, and the other is more of a business street.

15 Q. The place on Gay street, where the complaint is made, that the Bowie line is to have two tracks, the street is to be widened there, is it not?

A. Yes, sir. Well, the ordinance is not yet passed.

Mr. SEMMES: We object to that.

217 16 Q. Has an ordinance to that effect been introduced?

A. I think it has been advertised and will be introduced; the council has not been in session since then; it will be introduced.

17 Q. Whilst the ordinance has not been introduced, you have a reasonable expectation that it will be introduced and that it will be passed?

Mr. SEMMES: We object to that.

A. Well, I don't think there is any doubt of its being introduced, but as far as a man can judge of what a council will do—it is often hard to tell what they will do—I think it will be passed; that is a mere matter of opinion, of course, but we cannot always tell.

17 Q. Well, as mayor of the city, you are reasonably well acquainted with the policy of the municipal government?

A. Yes, sir. I am in favor of its being done.

Mr. SEMMES: Does not Lexington street, or, rather Douglas street, terminate in a broad plateau at the city hall?

A. Yes, sir.

Mr. SEMMES: And was or was it not chiefly for the purpose of reaching that point, as a distributing point, that it was opened through to the eastward?

A. No; I think that the principal object of opening Douglas street was to get another east-and-west thoroughfare. You see, there is no east-and-west thoroughfare north of Pratt street, really, until you get all the way up to Eager street, that the grade is not so heavy that it can be considered a good thoroughfare, except Fay-

ette street, and Fayette street is a narrow street; Baltimore street is a very crowded street, and Lombard street is not a direct east-and-west thoroughfare; you will have to go through very narrow portions after you leave Eager street, or you have to go all the way down to Pratt street before you get a level east-and-west thoroughfare, and from Pratt street you have to travel all the way up to Eager street before you get an available east-and-west thoroughfare. For that reason, I think that one argument in favor of the opening of Douglas street was to make another east-and-west thoroughfare in connection with the grading of Lexington Street hill; that was the argument that always influenced me in asking it.

18 Q. Then I understand that after you pass Lexington—the north, there is no other east-and-west thoroughfare until you reach Eager street?

A. No other good one, in my judgment, until you get all the way up to Eager street.

19 Q. How far is Eager street?

A. Well, it is 9 squares.

20 Q. All the streets immediately adjacent to Lexington on the north, namely: Saratoga, Pleasant and Mulberry have very steep hills, have they not, between Charles and Calvert?

A. They have very steep hills. I don't think Mulberry runs through; I think Mulberry stops at Calvert.

218 21 Q. It is true, is it not, with Mulberry street?

A. It stops at Calvert going east.

22 Q. And that Pleasant street stops at Charles.

A. Going west, yes, sir.

23 Q. And Centre street?

A. And Centre street is stopped by the railroad and railroad tracks on North street, that render it dangerous. Monument street is subject to the same objection, and Madison street to the same objection, and then Reade street does not go east of North street, so that you have to go all the way up to Eager street, before you get an east-and-west thoroughfare that is really available.

24 Q. And coming back this way, Franklin street is the next street to Mulberry, and it practically stops at Calvert?

A. Yes, sir; it runs into Little Franklin street there.

25 Q. Now, south of Lexington street, state whether or not every street that is a thoroughfare is encumbered with car tracks?

A. South of Lexington street, the first street is Fayette street, which is a narrow street; east of Holliday street a very narrow street, and it has a single track in the centre of it until you get some distance east; I forget what street the car track goes south from Fayette street on, and the next street south is Baltimore street, which is very crowded and is the main thoroughfare of the city; of course that has been greatly bettered by the widening of the narrows, but still it is a very crowded street always, and the next street below that is Lombard street, and that is a narrow street with one track in it; from Gay, I think it has two tracks now, from Gay east, and then you have to go all the way down to Pratt street before you get to the other thoroughfare.

26 Q. That has a track on it also?

A. It has two tracks.

27 Q. Please state whether you have any personal recollection or personal knowledge of any application having been made for the use of a steam-plow, for the purpose of tearing up Lexington street?

A. Well, I had not, until lately I heard of it; the city commissioner told me that an application had been made, but it did not come to me direct; it was only incidentally connected with this case that he told me that they applied for the steam-plow.

28 Q. Do you recollect, whether on the occasion that Mr. McLane and Mr. Smyrk were talking with you about the double tracks on Lexington street, between Calvert and North, your attention was called to another plat than the plat which showed the tracks between Calvert and North; I mean whether your attention was called to the plat which showed the tracks all the way up to Charles street?

A. No; I think that it was the only plat they had with them; they had one blue print; I think they spoke of the double track between Calvert and St. Paul, and of putting the two tracks
219 nearest the court-house, nearer the south side; they spoke of that, but I think the only plat they had, in my recollection, was the plat between North and Calvert street.

Cross-examination.

Mr. SEMMES:

1 X Q. Fayette street now is in the course of being widened, isn't it?

A. Yes, sir.

2 X Q. How wide, do you know?

A. I think to make a 60-foot street, my recollection is.

3 X Q. Was not the argument used to induce that widening the fact that Lexington street was too much of a grade and so contracted beyond Charles street, so that it never could be much of a thoroughfare?

A. Undoubtedly.

4 X Q. That was the argument used?

A. That was one of the arguments used.

5 X Q. That was the argument used to obtain the widening of Fayette street?

A. Yes, sir.

6 X Q. The grade of Fayette street is not as heavy as that of Lexington street, is it, even now that it has been cut down?

A. No, I don't think it is as heavy even now; I don't think it is as heavy as Lexington street now.

8 X Q. It is a matter of fact that the tracks of railroad- are used very largely by other vehicles, are they not?

A. Undoubtedly.

9 X Q. And they are laid so as to be so used?

A. Yes, sir.

10 X Q. Mr. Carter, let me refresh your recollection in reference

to Douglas street. The grade of Lexington street from Calvert up to Charles has been changed and made much less steep than it was, within the last two years, has it not?

A. Yes, sir; it has been, during Mr. Davidson's turn.

11 X Q. Now, suppose the grade on Lexington street had remained as it was before this change of which I have just spoken, would Lexington street from Calvert to Charles, have been available as a part of a thoroughfare, in connection with Douglas street as opened east from North street upon Holiday street?

A. It would not have been as available as it is now, undoubtedly; on account of the heavy grade on Lexington street; but from Calvert street east it would have been available.

12 X Q. Before the change of grade on Lexington street, was it not about a ten-per-cent. grade from Calvert to Charles?

A. From Calvert to Charles on Lexington street it was a very heavy grade undoubtedly; I don't know what it was.

220 13 X Q. Was it not so heavy that no vehicles carrying loads ever used it, unless they were compelled to do so for some purpose near by?

A. No, it was undoubtedly a very heavy grade and would have interfered very much with a direct thoroughfare from the extreme western part of the city; it would not have interfered from Calvert street, which is the central street in the city.

14 X Q. From Calvert street east you mean?

A. Yes, sir.

15 X Q. But you do not answer quite, as it no doubt escaped your observation, my last question. The examiner will please read it again?

(Question read.)

A. I think that is evident.

16 X Q. Now, is it not true that the Douglas street opening was decided upon, the ordinance passed and all the assessments levied, before the project of changing the grade of Lexington street was broached?

A. Undoubtedly.

17 X Q. Then is it not true that at the time the city determined to make the opening of Douglas street that the use of Lexington street from Calvert street westward as a part of the connection with Douglas street, had not been thought of?

WITNESS: The use of Lexington street?

Mr. CARTER: Westward from Calvert street.

A. Undoubtedly, from Calvert street to Charles, but not from Calvert street east.

18 X Q. Is not the narrowness of Lexington street from Charles street westward to about Liberty street such as to prevent Lexington street, even with the change of grade, from becoming one of the great thoroughfares east and west?

A. Undoubtedly it is west of Charles street, but not from the centre of the city, which is Calvert street.

19 X Q. Well, the grade of Lexington street, even as now altered,

has been stated to be a 6-foot grade, which is 6 feet in the hundred; is not that a grade which is not a favorable one for a large part of the traffic that is to be accommodated east and west?

A. It is. It is about the best you can get, though it is not favorable; it would be better if it was level.

20 X Q. So far as the driving on the street is concerned, does not the tramway of the rails afford facilities for vehicles using the street?

WITNESS: Do you mean afford a smooth roadway?

Mr. CARTER: Yes, sir.

WITNESS: By the vehicles driving in the rails?

Mr. CARTER: Yes, sir; undoubtedly they do.

221 21 X Q. Take Baltimore street today, as you look at it at this moment (looking out of the window), do not the larger part of the vehicles running on that street take the tracks rather — the space on either side of the tracks, so far as they can?

A. Yes, sir; certainly, always; you can look out now and see that.

Redirect examination.

Mr. BRYAN:

1 Re-D. Q. General Latrobe, you keep a horse, do you not?

A. Yes, sir.

2 Re-D. Q. And you drive about a great deal?

A. I drive about a great deal.

3 Re-D. Q. Would you prefer to drive on a street if it had tracks on it, or a street that had not tracks on it, for your own comfort?

A. I would undoubtedly prefer a street without railway tracks.

4 Re-D. Q. Is it not true that the railroad tracks in the different portions of the city are very injurious to the wheels and tyres of buggies and other light vehicles, which are driven about and through the city?

A. Yes, sir; I think undoubtedly the tramways interfere with the driving; I do not say that I would get rid of the tramways, though they do interfere with the carriage travel.

General question by the EXAMINER:

Do you know or can you state any other matter or thing, that may be of benefit or advantage to the parties to this suit or either of them, or that may be material to the subject of this, your examination, or the matters in question between the parties? If yea, state the same fully and at large in your answer.

A. I do not.

The signing of his depositions by this witness is waived by agreement of the solicitors for the respective parties.

No other witnesses being named or produced before me, I then, at the request of the solicitors of the plaintiff, closed these depositions and now return them closed under my hand and seal, this

30th day of December, A. D. 1892, at the city of Baltimore, in the State of Maryland.

J. G. PITTS, *Examiner.* [SEAL.]

There are 24 exhibits with these depositions, to wit:
Plaintiff's Exhibits, 1 to 15 inclusive, filed with the bill.
" " Examiner "Oster."
Defendant's Exhibits, Nos. 1, 2 and 3 filed with the answer.
" " Examiner "R. K. C." Nos. 1, 2, 3, 4 and 5.

J. G. PITTS, *Examiner.*

222 PLAINTIFF'S EXHIBIT EXAMINER "OSTER."

(Filed with the examiner Dec. 10, '92.) J. G. Pitts, Examiner.

OFFICE OF INSPECTOR OF BUILDINGS,
BALTIMORE, *Nov. 7th,* 1892.

Permission is hereby granted to Lake Roland Elevated R. R. Co. to use a temporary steam boiler on Lexington street.

By order of the mayor:

J. THEO. OSTER,
Inspector of Buildings.

DEFENDANT'S EXHIBIT EXAMINER R. K. C., No. 1.

(Filed with the examiner December 23, 1892.)

This is a plat, the original whereof will be produced under the agreement as to record in this cause.

DEFENDANT'S EXHIBIT EXAMINER R. K. C., No. 2.

(Filed with the examiner December 23, 1892.)

Extract taken from "The Sun, Baltimore, Friday morning, November 4, 1892.

"*Proposed Tracks on Lexington Street.*

"Mayor Latrobe has had a consultation with the city commissioner about the location of the tracks of the Roland Avenue Electric Railway Company. The company, by the terms of an ordinance passed in the session of the council in 1890, has the power to lay a double track on North and Lexington streets. On North street the tracks are to be put upon an elevated structure on such portions of the street where the tracks of the Northern Central are laid on the surface.

"Mayor Latrobe said yesterday: 'The ordinance in its present form should never have been passed by the mayor and city council. The elevated road on North street practically ruins for a business thoroughfare the street that is really the naturally north-and-south

thoroughfare in central Baltimore. In fact, I do not see how the business of Baltimore can be accommodated as the city increases without another north-and-south street. Calvert street is already overcrowded, and the streets west of Calvert street to Charles street cannot be utilized in this way. In addition to this, Lexington street, between North and Calvert streets, is not wide enough to accommodate a double-tracked railway. If double tracks are laid in the middle of this part of Lexington street there will not be sufficient space left on either side of the tracks to allow a vehicle to travel. The result is that the railway company proposes to lay its tracks close to the curb on the south side of the street. Even this leaves a narrow roadway for vehicles on the north side, between the tracks and the curb, greatly interfering with the exit of the fire-engine from No. 4 engine-house, and practically shutting up the front of the new post-office building on Lexington street.

223 "'There will be the same objection, though not to a similar extent, in these double tracks going up Lexington-street hill, from Calvert street to St. Paul, and thence to Charles street, although that portion of Lexington street is a little wider. The city is confronted with what will certainly be a great public inconvenience, and I hope the next council will provide some remedy by a repeal of some of the privileges granted in this ordinance, which should never have been passed in the first instance. Only a single track should be allowed under any circumstances on Lexington street, between North and Calvert streets, otherwise an eastern thoroughfare, which, by the opening of Douglas street, the city will have provided at a cost of nearly $600,000, will be practically monopolized by a street railway.'"

DEFENDANT'S EXHIBIT EXAMINER R. K. C., No. 3.

(Filed with the examiner Dec. 23rd, 1892.) J. G. Pitts, examiner.

Extract from "The Sun, Baltimore, Tuesday morning, Nov. 8th, 1892.

"Tracks on Lexington Street.

"The Lake Roland Elevated Railway Company has commenced to lay double tracks on Lexington street west of North street. The street has been torn up as far as Calvert street and the rails placed in position. The tracks are laid on the south side of the street, the most southerly rail being within two feet of the pavement. This is according to the plan proposed by the company, to which Mayor Latrobe objected.

"The mayor requested a conference with the Federal officials in the post-office building. Postmaster Johnson, who has general supervision of the building, was in New York. United States Marshall Airey called upon the mayor, who suggested that the Federal authorities could apply for an injunction to stop the work on the ground that the tracks would interfere with the mail carts going to

and from the post office. Marshall Airey said he would confer with Postmaster Johnson upon his return from New York.

"Under the ordinance authorizing the building of the road the company has the right to lay double tracks, and the mayor stated that the city cannot stop the work until an ordinance is passed by the city council limiting the company to one track. The mayor sent the following letter to Mr. James L. McLane, president of the company:

"'I notice that your company has commenced laying a double track on Lexington street between North and Calvert streets. I wish to inform you that, as I had already indicated, I think the public interest requires that no more than a single track should be laid on that portion of Lexington street. The city law officers have informed me that it is competent for the city council to pass an ordinance prohibiting the laying of a double track there. At the next session of the council an ordinance will be introduced prohibiting your company from laying double tracks on the portion of Lexington street between North street and the east side of Calvert street. I write this to prevent your going to the unnecessary expense of laying a system of double tracks and afterwards being required to remove them.'"

224 DEFENDANTS' EXHIBIT EXAMINER R. K. C. No. 4.

(Filed with the examiner Dec. 23, 1892.)

J. G. PITTS, *Examiner.*

Extract from The Sun, Baltimore, Saturday morning, Nov. 5, 1892.

"*Lake Roland Railway Tracks.*

"City solicitor, Byran, has been consulted by the mayor upon the right of the city to limit the Lake Roland Elevated Railway Company to the construction of one track on Lexington street, between North and Charles streets. Owing to the narrowness of the street, double tracks would leave but little space between the tracks and curbings. The railway company suggested that both tracks be laid on the south side of the street, thus giving the north side of the street for the use of wagons and carriages. Under its charter the company has the right to lay double tracks. The city solicitor informed the mayor that in his opinion it is within the power of the city council to require by ordinance that only a single track be laid. The mayor states that he considers this matter very important. When the new counsel meets he will submit an ordinance which the city law officers are now preparing, 'to prevent the obstruction, or rather blockading, of Lexington street, by a double track.'"

DEFENDANTS' EXHIBIT EXAMINER R. K. C. No. 5.

(Filed with the examiner December 23, 1892.)

J. G. PITTS, *Examiner.*

Washington express measures 6 ft. 5 in. hub to hub.
One-horse four-wheel wagon measures 6 ft. 3 in. hub to hub.
One-horse carriage measures 6 ft. 1 in. hub to hub.
One-horse hack measures 6 ft. 3 in. hub to hub.
Adams' express wagon measures 6 ft. 4½ in. hub to hub.
Three-horse furniture van measures 7 ft. 6 in. hub to hub.
Three-horse furniture van measures 8 ft. 4 in. out to out of horses.
Three-horse furniture van measure- 8 ft. 4 in. out to out of swingle trees.
Coal cart measures 6 ft. 8 in. hub to hub.
Hitchen's transfer wagon measures 7 ft. 4 in. hub to hub.
Central R. R. electric cars measures 7 ft. 9 in. out to out.
Gauge of this track measures 5 ft. 4½ in.
This makes cars overhang 1 ft. 2½ in. on each side.
North avenue electric cars measures 7 ft. 3 in. out to out.
Gauge of the track 5 ft. 4½ in.
This makes cars overhang 1 ft. 1¼ in. on each side.

225 *Agreement for Submission and as to Record, &c.*

(Filed 30th December, 1892.)

In the Circuit Court of Baltimore City.

THE LAKE ROLAND ELEVATED RAILWAY COMPANY
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*

It is agreed in this case, that the testimony taken after the expiration of the time prescribed by the order of the court for the taking of the same, shall have the same effect as if taken within the same time.

It is further agreed that the case shall be submitted to the court for final decree, without argument, as the bill, answer, testimony and exhibits, and that the testimony taken under the order of court heretofore passed shall be considered as applicable to the hearing for final decree.

It is further agreed that a decree *pro forma* shall be signed, refusing the injunction prayed for, and dismissing the bill of complaint with costs.

And it is further agreed that in making up the record for the court of appeals of Maryland, all ordinances of the mayor and city council of Baltimore which have been offered in evidence, shall be

omitted from the record, it being agreed that all of said ordinances, and any other ordinance of the mayor and city council of Baltimore, which either party may desire to use at the hearing in the court of appeals, may be read from the printed volumes containing said ordinances.

And it is further agreed that no part of the issues of the Baltimore Sun, filed as exhibits by the defendants, shall be inserted in said record except the marked portions indicated by the defendants' solicitor.

And it is further agreed that the plats filed by the respective parties shall not be inserted in the record, but may be taken to, and used in, the court of appeals.

And it is further agreed that either party may use in the court of appeals a map of the city of Baltimore for any purpose such party may desire to use it.

BERNARD CARTER,
W. A. FISHER,
STEELE, SEMMES & CAREY,
Solicitors for Plaintiff.
WILLIAM S. BRYAN, JR.,
City Solicitor for Defendants.
THOMAS G. HAYES,
City Counsellor for Defendants.

226 *Decree Pro Forma.*

(Filed 30th December, 1892.)

In the Circuit Court of Baltimore City.

LAKE ROLAND ELEVATED RAILROAD COMPANY
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*

This cause standing ready for hearing and having been submitted for final decree by the foregoing agreement; the bill, answer, exhibits, testimony and the other proceedings were read and considered.

It is thereupon on this 30th day of December, in the year 1892, ordered and decreed *pro forma*, that the injunction asked for in the said bill of complaint be, and the same is hereby refused, and that the said bill of complaint be, and the same is hereby dismissed with costs.

J. UPSHUR DENNIS.

Plaintiff's Order for Appeal.

(Filed 4th January, 1892.)

In the Circuit Court of Baltimore City.

LAKE ROLAND ELEVATED RAILWAY COMPANY
vs.
MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*

Mr. Robertson, clerk:

Please enter an appeal to the court of appeals from the decree *pro forma* passed in the above-entitled cause on the 30th day of December, 1892.

STEELE, SEMMES & CAREY,
Solicitors for Plaintiff.

Which said appeal being by the court here also granted, it is thereupon ordered by our said court that a transcript of the record and proceedings in the cause aforesaid be transmitted to the court of appeals of Maryland under the agreement in said cause filed, and the same is transmitted accordingly.

Test: ALVIN ROBERTSON, *Clerk.*

In testimony that the aforegoing is truly taken from the records and proceedings of the circuit court of Baltimore city, in the cause therein entitled—

(Place of Seal.) I hereunto subscribe my name and affix the seal of the circuit court of Baltimore city aforesaid, this 4th day of January, A. D. 1893.

ALVIN ROBERTSON,
Clerk of the Circuit Court of Baltimore City.

227 Court of Appeals of Maryland, January Term, 1893.

LAKE ROLAND ELEVATED RAILWAY COMPANY
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE and ALFRED E. SMYRK, City Commissioner.

The appeal in this case, standing ready for hearing, was argued by counsel for the respective parties, and the proceedings have since been considered by the court.

It is thereupon, this sixteenth day of March, 1893, by the court of appeals of Maryland and by the authority thereof adjudged, ordered, and decreed that the *pro forma* decree of the circuit court of Baltimore city, dated the 30th day of December, 1892, from which this appeal was taken, be, and the same is hereby, affirmed, with costs.

R. H. ALVEY. DAVID FOWLER.
JNO. M. ROBINSON. HENRY PAGE.
WM. SHEPARD BRYAN. JOHN P. BRISCOE.
JAS. McSHERRY.

STATE OF MARYLAND, *set:*

I, J. Frank Ford, clerk of the court of appeals of Maryland, do hereby certify that the foregoing is truly taken from the record of proceedings of the said court of appeals.

In testimony whereof I have hereunto set my hand as clerk and affixed the seal of the said court of appeals this 30th day of November, A. D. 1894.

[SEAL.]

J. FRANK FORD,
Clerk Court of Appeals of Maryland.

228 MEM.—The foregoing exhibit is thus endorsed:

"Ordered this 12 Dec., 1894, that this duplicate of Defendants' Exhibit No. 2 be substituted in place of the one originally filed April 26, 1893, which has been lost. Thos. J. Morris, judge.'

MEM.—The plats referred to in the foregoing Exhibit No. 2 as Plaintiff's Exhibit No. 7, Plaintiff's Exhibit No. 8, Plaintiff's Exhibit No. 14, Plaintiff's Exhibit No. 15, and Defendants' Exhibit No. 3 will be found on the following five pages.

JAS. W. CHEW, *Clerk.*

234 DEFENDANTS' EXHIBIT No. 3.

Filed April 26, 1893, with Defendants' Answer.

Court of Appeals of Maryland, January Term, 1893.

LAKE ROLAND ELEVATED RAILWAY COMPANY
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE and ALFRED E. SMYRK, City Commissioner.

Judge Bryan delivered the opinion of the court.

It has been for a long time recognized as the law that the mayor and city council of Baltimore have full and complete control over the streets and highways of the city. It has been considered, however, that certain uses could not be made of them without the sanction of an act of the General Assembly. For this reason the legislature saw fit to enlarge the corporate powers of the city.

The act of 1890 entitled "An act * * * giving the mayor and city council (of Baltimore) authority to regulate the use
235 of the streets, lanes, and alleys of said city by railway or other tracks, &c., &c., &c.," provided as follows: "The mayor and city council of Baltimore shall have power to regulate the use of the streets, lanes, and alleys in said city by railway or other tracks, gas or other pipes, telegraph, telephone, electric light, or other wires and poles, in, under, over, or upon the same, and may require all such wires to be placed under ground, after such reasonable notice as they may prescribe."

Under the authority of this act the city council passed ordinance No. 23, approved April 8th, 1891. This ordinance permitted the

North Avenue Railway Company to lay down tracks on certain of the streets of Baltimore, including Lexington from North street westward to Charles street. It also permitted the erection of an elevated railway on a portion of North street. As the city council had no power to authorize an elevated railway it became necessary to obtain the ratification of this part of the ordinance by the legislature. The act of 1892, chapter 112, after reciting that "before the said North Railway Company of Baltimore City can elevate its tracks on North street as aforesaid, it is required by law that the sanction of the General Assembly of Maryland should be given to said ordinance so far as it relates to said elevation of its tracks" enacted that the ordinance should be ratified and confirmed, and that the ratification should have the same effect as if the mayor and city council of Baltimore, at the time of the passage of said ordinance, had been fully authorized by the General Assembly to pass said ordinance,
and to grant each and all of the powers and privileges
236 therein contained; the said mayor and city council to have
the same power and control hereafter in reference to the enforcement, amendment, or repeal of said ordinance as it has or would have in respect to any ordinance passed under its general powers." Ordinance No. 1, approved November 18th, 1892, repealed that portion of ordinance No. 23 which authorized the double tracks on Lexington street, but permitted the laying of a single track on certain conditions.

It must be mentioned that by due proceedings the Lake Roland Company has been invested with all the rights and franchises of the North Avenue Company. The tracks have been laid under circumstances which will hereafter be stated. The question now presented to the court is whether the city council had power to pass the ordinance of November 18th, 1892.

Before we proceed to the investigation of this question we must bear in mind that it has been solemnly adjudged by this court that the mayor and city council of Baltimore cannot abridge its own legislative powers. State *vs.* Graves, collector of Baltimore, 19 Maryland 351. Rittenhouse *vs.* Mayor, &c., of Baltimore, 25 Maryland 337. In State *vs.* Graves (just mentioned) the court refers to the opinion of the learned Judge Martin in the superior court of Baltimore as "cogent, clear, comprehensive and well sustained by the authorities" and as "a sound exposition of the law" in which it
entirely concurs. In his opinion Judge Martin says, "It is
237 clear that the mayor and city council has no power by any
contract or covenant or by any ordinance by law or resolution to restrain or abridge its own legislative capacities." This matter will be considered more fully hereafter; but it is important at present to examine critically these two ordinances for the purpose of ascertaining whether any circumstances exist which prevent the application of the principle which we have mentioned. Ordinance No. 23 authorized the construction of double tracks from the intersection of North avenue and McCulloh street over a number of streets to the intersection of North and Lexington streets, and thence on Lexington street to Charles. It also mentioned an elevated rail-

way from the corner of Eager and North to the corner of North and Saratoga. It was also enacted that the railroad company should be liable to the payment of the park tax which was imposed by act of assembly on the horse railway companies, and that it should have the right to propel its cars by electricity, cable or other improved motive power; but that it should not be allowed to use steam motive power on any part of its railway. It was also enacted that the cars of the company should not travel on any of its tracks lying to the east of Pennsylvania—at a greater rate of speed that ten miles an hour, exclusive of stoppages, except while on the elevated track on North street, when the speed might be increased to fifteen miles an hour, and that on its tracks lying to the west of Pennsylvania — the speed should not be greater that fifteen miles an hour. A number of other regulations were made concerning the rate of fare and the mode
238 in which the tracks should be laid and the road operated and conducted, and concerning the keeping in repair the portion of pavement between its tracks and two feet on each side of them. It was very strenuously insisted at the argument that this ordinance was a contract by which the mayor and city council were irrevocably bound, and many authorities were quoted and pressed upon the court for the purpose of sustaining this position. They have been very carefully and attentively considered with a due sense of the great importance of the question involved. Among other cases, great reliable was placed on People *vs.* O'Brien *et al.*, 111 New York, page 1, and certainly in that case the court did hold that the common council of the city of New York had granted to the Broadway Railroad Company a right to lay tracks and run cars over Broadway from the Battery to Fifteenth street, which conferred on the railroad company an estate in perpetuity in Broadway, and that the railroad's right was property within the usual and common signification of the word.

But the nature of the transaction between the common council of New York and the railroad company was very different from the one now under consideration. We learn from this opinion that under an amendment to the constitution of 1874, the right to operate a railroad on the streets of any municipality is regarded as a privilege which should be disposed of for the benefit of the municipality to any one who would pay the highest price for it, and that such privilege may be indefeasibly acquired by contract, and that the payment of a
239 considerable sum of money annually was one of the terms on which the privilege was granted to the Broadway Surface Railroad Company. It is also stated that legislation has sometimes required that these privileges should be sold by auction, and that now by the laws of 1866 it is in all cases obligatory on the municipalities of the State to sell them by auction to the highest bidder. This constitutional amendment wrought a very great change in the power of city government over their streets, as may be readily seen by an examination of cases decided before the amendment went into effect. In Davis *vs.* New York, 14 New York, 506, and in Milham *vs.* Sharp, 27 New York, 611, a grant by the common council

of New York authorizing the construction of a railway in Broadway was held void. The principle of decision in theses cases was that a permanent grant of this kind divested the corporation of New York city of the exclusive control over the streets which had been given to it as a trust for the use of the public, and which it was not competent to relinquish. New Orleans, &c., Railroad Co. *vs.* Delamore, 114 U. S., 510, was also earnestly pressed upon us. In that case it was decided that when the city of New Orleans had granted a right of way over certain streets to a railroad company it could not afterwards grant a similar right to another railroad company through and over the same streets and along the same route. In estimating the bearing of this decision on the case before us we must bear in mind that the city of New Orleans has the
240 power to sell the right of way over its streets for the purpose of a railroad. It was so held in Brown *vs.* Duplessis, 14 (9) Louisiana Annual Reports, 842. The decision of the Supreme Court of the United States just quoted held that the right of way being vested in the first grantee could not be divested by a subsequent grant of same franchise to another corporation. New Orleans Gas Company *vs.* Louisiana Light Co., 115 United States, 650, was also cited.

The legislature of Louisiana had incorporated a gas-light company and had granted it the exclusive privilege of vending gas-lights in the city of New Orleans. The court held that the charter thus granted was a contract between the State and the corporators, and that its obligations were impaired by an ordinance of the city of New Orleans authorizing another corporation to lay mains and pipes in the streets for the purpose of supplying the public with gas. The differences are very striking between the laws of Maryland and those of New York and Louisiana on the questions decided in the cases cited by the learned counsel. We are at present concerned with the chartered powers belonging to the city of Baltimore. In State *vs.* Grabes, *supra*, the mayor and city council had passed an ordinance for widening Holliday street. The assessment of damages and benefits was duly made and confirmed, and the commissioners for opening streets sold the materials in the houses which would be in the bed of Holliday street when widened, and also sold portions of the lots which would be divided by the opening of the street. The ordinance
241 was afterwards repealed. A purchaser of one of these lots filed a petition for a mandamus to compel the city authorities to proceed with the opening of the street in the same manner as if the repealing ordinance had not been passed. The opinion of Judge Martin in the superior court of Baltimore (which was adopted by the court of appeals) stated that as the State had made a delegation of local legislative powers to the city, in its political capacity, for public purposes, the right to repeal the ordinance and arrest the improvement at any stage of its progress necessarily belonged to the city as an incident to its legislative power. He recognized the fact that those who purchased property within the lines of the proposed widening of the street did so under the promise and expectation

that it would be widened, and that they had been materially injured by the repeal of the ordinance. The court of appeals in the same case said:

"The mayor and city council are but trustees of the public; the tenure of their office impressed their ordinances with liability to change. They could not, if they would, pass an irrevocable ordinance. The corporation cannot abridge its own legislative powers."

But it also stated that the purchaser might recover damages for any loss sustained by failure of the city to execute its contract. In Rittenhouse *vs.* Baltimore, 25 Maryland, 336, an ordinance had been passed for the erection of an almshouse and a contract had been made with the city, acting through a duly constituted agent, for the doing of certain brickmasons' work, including the
242 supply of bricks, lime, and sand. After some of the work had been done an ordinance was passed declaring that the public good required the building to be discontinued, and repealing the ordinance which provided for the erection of the almshouse. Rittenhouse brought suit to recover damages for a breach of the contract made with him. This court drew a clear and well-defined distinction between contracts made by a municipal corporation in the character of a property-holder and those which arise out of the powers entrusted to it for public purposes. It may be well to quote the language of the court on this point:

"In considering the rights, powers, and liabilities of public municipal corporations in respect to contracts made by them regard must be had to the subject-matter to which such contracts relate and the character in which the municipal body acts in making them. Where a corporation appears in the character of a mere property-holder and enters into a contract with reference to such property as any private citizen or other proprietor might do or where it engages in an enterprise not necessarily connected with or growing out of its public capacity as a part of the local government, there all of its rights and liabilities are to be measured and determined by the same rules as govern mere individual persons or private corporations, and it cannot claim exemption or immunity from the legal liabilities growing out of its contracts by reason of its public municipal character. The cases of Bailey *vs.* The Mayor, &c., of New York, 3 Hill, 531; Masterdon *vs.* The Mayor, &c., of Brooklyn,
243 7 Hill, 61, and the Western Saving Fund Society *vs.* The City of Philadelphia, 31 Pa. (7 Casey), 175 & 185, are illustrations of this principle. See also Moodaly *vs.* The East India Company, 1 Brown's Ch. R., 469. The same cases recognize a distinction between the rights and liabilities of municipal corporations growing out of contracts made by them in their private capacity as property-holders and those which arise out of the exercise of powers entru-ted to them in their municipal characters exclusively for public purposes, with regard to which courts have no power to review or control their acts unless they transcend the limits of their delegated powers. In the case of the Presbyterian Church *vs.* The Mayor, &c., of New York, 5 Cowen, 538, which was an action by

the church against the city upon a covenant for quiet enjoyment, the corporation had conveyed lands to the plaintiff for the purpose of a church and cemetery with a covenant for quiet enjoyment. Afterwards the corporation, in the exercise of a power delegated to it by an act of the legislature, passed a by-law prohibiting the use of the lands as a cemetery. It was held that this was not a breach of the covenant which entitled the plaintiff to damages, but was a repeal of the covenant. It was held that a municipal corporation cannot by a contract abridge its legislative powers. It was also held that the contractor was entitled to recover any damages which he had actually sustained by reason of the contract while it was operative and in force, but not damages on account of profits which he might have made under the contract if he had been permitted to go on with the work.

244 It is perfectly well settled that a municipal corporation has a right to abandon any public improvement and repeal at its pleasure any ordinance providing for the same, and property-owners cannot compel it to take and pay for property condemned for such purposes. The right of repeal is unquestionable, but if in the exercise of this undoubted right injury is inflicted upon the property-holder he can recover damages by action at law. It has even been held that an unreasonable delay in repealing the ordinance will give a cause of action if injury ensue or an unreasonable delay by the city in determining whether it would take the property condemned. Graff *vs.* Mayor, &c., of Baltimore, 10 Maryland, 544; Norris *et al. vs.* Mayor, &c., of Baltimore, 44 Md., 606; Mayor, &c., of Baltimore, *vs.* Musgrave, 48 Maryland, 272. In Newton *vs.* Commissioners, 100 United States, 548, the legislature of Ohio had passed an act establishing the county seat of Mahoning county at Canfield, and providing that before it should be considered permanently established at that place the proprietors or citizens thereof should give bond with sufficient security payable to the commissioners of the new county thereafter to be elected for the sum of five thousand dollars to be applied in the erection of public buildings for the county, and that the citizens of Canfield should also donate a suitable lot of ground for the erection of public buildings. The bond was given as required, a suitable lot of ground was conveyed to the county, and the citizens, at a cost of more than ten thousand dollars, erected on the lot a commodious court-house for the transac-

245 tion of the public business, which the commissioners accepted in full satisfaction of the bond, and as a full compliance with the act; and thenceforward Canfield became the county seat. Nearly thirty years afterwards the legislature passed a statute for the removal of the county seat to Youngstown. On a petition for an injunction to restrain the county commissioners from removing the county seat, one of the questions was whether it was competent for the State to enter into such a contract as was alleged to have been made. The Supreme Court held that although there were cases in which a State might lay aside its sovereignty and contract like an individual and be bound accordingly, it could make no contract and pass no irrepealable law about "governmental subjects."

Speaking of the Dartmouth college case, it said: "The principle there laid down and since maintained in the cases which have followed and been controlled by it has no application where the statute in question is a public law relating to a public subject within the domain of the general legislative power of the State and involving the public rights and public welfare of the entire community affected by it. The two classes of cases are separated by a broad line of demarkation." And in a subsequent part of the opinion, speaking of legislative acts concerning public interests, the court said: "Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All
246 occupy in this respect a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil." In Illinois Central Railroad Company *vs.* Illinois, 146, United States, 387, the legislature of Illinois, by an act passed in 1869, had granted to the Illinois Central Railroad Company all the right and title of the State of Illinois to submerged lands, constituting the bed of Lake Michigan, for the distance of a mile into the lake. It was stipulated that the railroad company should pay to the State seven per cent. of the gross receipts from the use, profits, and leases of the lands granted or the improvements thereon, or that might be made thereon, and that in conjunction with three other railroad companies (to whom grants were made in the same act) it should pay eight hundred thousand dollars to the city of Chicago in instalments of two hundred thousand dollars each. The first instalment of two hundred thousand dollars was tendered by the four companies, but was refused by the city. The railroad company erected piers and expended a large sum of money in the improvement of the property granted by an act of the legislature. In 1873 the legislature of Illinois repealed the act making this grant. The question for the court was whether the repealing act was valid. It was held to be valid. In the course of its opinion the supreme court said:
247 that the ownership of lands lying under the navigable waters of the Great Lakes and the dominion and sovereignty over them resided in the States within whose limits they were included; that a State could not abdicate its general control over such lands; that such abdication was not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public; that this trust could be discharged only by the management and control of the property and could not be relinquished by a transfer of it; that the control of the soil and beds of navigable waters was held by the people for their common use and of common right as an incident to their sovereignty; that the legislature could not give away nor sell the discretion of its successors in respect to matters the government of which from the very

nature of things must vary with varying circumstances; that every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it, and that there could be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust under which he was bound to hold and manage it. The decree was that such portion of the piers erected by the railroad company should be removed as extended beyond the point where the navigable waters of the lake commenced. In 1850 the legislature of Illinois had given the railroad company a right of way two hundred feet in width, but enacted that it should not make a location of its track within any city without the consent of the common council. The common
248 council of Chicago, in 1852, gave its consent, upon certain terms, to the construction of the track within the limits of the city and along the margin of the lake, and the track was located and the road constructed. The case involved no question in reference to the occupation and use of this track and no question of the kind was decided. We may mention another case which has a bearing on the present one. In Gasyler *vs.* Georgetown, 6 Wheaton, 593, it appeared that the corporation of Georgetown had passed an ordinance by which it was enacted that a level and graduation which had been made for certain streets should be binding on the corporation and all other persons whomsoever and be forever thereafter regarded in making improvements on said streets. The plaintiff owned lots on one of these streets and made improvements on them according to the graduation which had been made, and afterwards the corporation passed another ordinance directing the level and graduation of this street to be altered. In consequence of this alteration it became necessary to cut down the street in front of the plaintiff's house. The question was whether the repealing ordinance was valid. The court said, "It cannot be disguised that a promise is held forth to all who should build on the graduated streets that the graduation should be made unalterable." The repealing ordinance was, however, held valid. The ground was that the corporation of Georgetown could not make a contract which should operate so as to bind its legislative capacities forever thereafter. Dillon on Municipal Corporations, section 97 (fourth edition), sums up the doctrine in
249 these words and cites a very large number of authorities:

"Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot, as we have just seen — delegated, so that cannot without legislative authority, express or implied, be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." The application of these principles to the present case will be apparent when we have considered with particularity the repealing ordinance and the circumstances under which it was passed.

The ordinance makes the following recitals:

"Whereas, by a provision in ection 1 of ordinance No. 23, approved April 8th, 1891, and entitled: 'An ordinance to authorize the construction of city passenger railway tracks by the North Avenue Railway Company on North avenue, from McCulloh street to Guilford avenue, and thence on Guilford avenue and North street to Lexington street, and thence on Lexington street to Charles street, and on North street to the north side of Fayette street,' the North Avenue Railway Company of Baltimore City was authorized and licensed to lay down and construct double iron railway tracks for the purposes of its business on divers streets of the city, among others on Lexington street between North street and Charles street; and whereas it appears to the mayor and city council of Bal-
250 timore that the public safety and convenience and the proper regulation of the use of the streets requires that there shall not be more than one iron railway track laid down, constructed, maintained, or use on said portion of Lexington street; and whereas the president and other officers of the said North Avenue Railway Company knew before any expense was incurred by the said company or before any portion of the work of laying said tracks on said portion of Lexington street had been done, that in the judgment of the mayor and city commissioner the laying of a double set of iron railway tracks on said portion of Lexington street would be detrimental to the public interest; and that the city solicitor had given the opinion that the mayor and city council had full power to alter or revoke the authority given by said section 1 of ordinance 23, of April 8th, 1891, to lay double iron railway tracks on said portion of Lexington street, and that the mayor would on the earliest practicable occasion recommend the passage of an ordinance altering and revoking the authority to lay such double iron railway tracks on said portion of Lexington street." Douglas street has recently been opened and extended so as to connect with Lexington and make a continuous thoroughfare from the western extremity of the city to a remote point in the eastern part. The cost of this improvement, including paving, will be about six hundred thousand dollars. There is no street between Lexington and the water on the south which is not obstructed in some part of it by railroad tracks; and none nearer than Eager on the north
251 (nine blocks distant), which can be used as a thoroughfare from the western to the eastern part of the city. The city hall is at the southeastern corner of North and Lexington streets; and on Lexington between North and Calvert streets are the fire-engine house No. 4 and the office of the liquor-license board on the north side, and on the south side is the United States post-office building, in which are the rooms of the United States court and the internal revenue office. Between Calvert and St. Paul are the court-house of the city (with its principal entrance on Lexington) and the record office; and the other buildings between Calvert and Charles are principally used for offices of lawyers and real-estate brokers.

By measurement it is shown that the distance between the overhanging sides of the cars and the gutter on the south side of Lex-

ington street between Charles and Calvert will vary from four feet seven inches to three feet eight inches, and on the north side it varies from four feet seven inches to three feet four inches, and between Calvert and North streets on the south side the side of the car will project one inch over the outside edge of the gutter, and on the north side it will vary from eight feet two inches to eight feet ten inches. Measurements were also made of different vehicles, ranging from the large furniture van to the small one-horse carriage, and it was found that they measured from eight feet four inches for the largest to six feet one inch for the smallest. The maximum rate of speed allowed for the cars on this part of
252 the track is ten miles an hour. The distance from North to Charles street being eleven hundred feet, if the cars run at half the permitted speed they will pass over this space in two and a half minutes. And it is stated in the bill of complaint that at certain hours of the day it will be "necessary to run cars on Lexington street at intervals of three or two minutes, and sometimes at an interval of one minute apart." It must be very obvious that the existence of these tracks is incompatible with the use of this part of the street as a driveway. The control of the city over the streets is attended with the duty of preserving them for their legitimate purposes. They are intended for the passage of the people over them on foot, on horseback, and in vehicles on their various occasions of business, convenience, and pleasure. It is not competent for the city to defeat the primary purposes for which they were dedicated to the public use. They are highways and must be maintained as highways so long as they are kept in existence. The power over the streets is held on the same trusts as the other legislative powers conferred on the mayor and city council. It is intended to be used for the purpose of preserving them in the character of streets in such condition as they may be most suitable for the public use. It is of incalculable importance to the public interest, and there can be no more reason to suppose that the city can abridge or surrender this legislative power than any other. In the State of New York, where, as we have seen, a railroad may by the constitution and statutes acquire an estate in perpetuity in the streets, it is held that statutes authorizing telegraph companies to erect
253 and construct the necessary fixtures for their lines upon public streets could be repealed after the fixtures had been erected. American Rapid Telegraph Company *vs.* Hess *et al.*, 125 New York, 641. We will quote from the opinion of the court. "The people of the State do not own the streets, and the only authority the legislature has over them is to deal with them as streets and to regulate their use as streets for public purposes, and by these acts it in effect determined that one of the purposes for which the street could be used was the erection of poles and stringing of wires for the business of telegraphing, and that there was a public use not inconsistent with the use of the streets for general street purposes. These were general, public legislative acts in the exercise of the police power of the State, and therefore they were not beyond the reach or touch of future legislation. The legislature did not intend to

divest itself and could not divest itself of its control over the streets for the public welfare, and we must infer from the language used that it did not intend to bind itself by an irrevocable grant. If, therefore, these acts are to be construed as merely conferring a license which has been acted upon by the plaintiffs, the legislature could revoke the license or modify it in any way or at any time when the public interest might require it." If an ordinance cannot be repealed which will *reuce* Lexington street to the condition which we have described, then truly the city council have lost all control over the streets and have renounced their
254 legislative power; and it will be demonstrated that they have the power to destroy their utility for the legitimate purposes of streets and to convert them into places of extreme peril to life and limb, but not the power to keep them in a condition suitable for their ordinary use as highways. Our municipal governments were not instituted for the purpose of making any such result possible. The repealing ordinance was passed because, as stated in the preamble, the city council thought that it was required by the "public safety and convenience and the proper regulation of the use of the streets." These considerations for the repeal were within their legislative judgment and discretion and the evidence shows that the ordinance has "a real and substantial relation" to the objects proposed; it is therefore not subject to supervision or review by the courts. This legislative authority over the streets delegated to the city is sometimes classified as belonging to the police power—that is to say, that great power which embraces the protection of life, limb, health, and property and the promotion of the public peace and safety; it is a high conservative power of the utmost importance to the existence of good government. It has been most emphatically declared by the Supreme Court of the United States on several occasions that a State cannot limit its exercise of this power by contract or in any other way. Some of the best known and most striking cases are Stone *vs.* Mississippi, 101 United States, 814; Boston Beer Company *vs.* Massachusetts, 97 United States, 25, and Fertilizing Company *vs.* Hyde Park, 97 United States,
255 659. But supposing this designation not to be appropriate in the present instance, the name given to the power is of no importance; it is expressly conferred by the legislature.

Although the city had a right to repeal this ordinance, it would have been obliged to make compensation to the railroad company if the expense of laying the tracks on Lexington street had been reasonably incurred in reliance on ordinance No. 23. The cases which we have already cited, show the opinion of this court on this subject. But the tracks were laid on Lexington street after the mayor's objection to a double track was made known to the president of the railroad company. The work was commenced on the thirty-first of October, but it was suspended the same day, before the tracks were located. On the third of November an interview took place between the mayor and the president of the railroad company, in which the mayor stated his objections to a double track.

The Baltimore Sun of the next day, contained a detailed statement of the mayor's reasons for his opposition to the double track.

After the interview with the mayor, the work was pressed forward with extraordinary vigor. On the seventh of November, the mayor and city solicitor each wrote a letter to the president informing him that at the first meeting of the city council, an ordinance would be submitted to prohibit the laying of the double track. After the receipt of these letters by the president, the work of laying
256 the double track was continued night and day without intermission until it was completed. The general manager of the railroad testified that he did not know that there had ever been any construction work done in the city at night, except what was done on Lexington street. Lexington street had not been reached in the regular course of the construction of the road. The elevated structure on North street had not been completed, nor had the tracks been laid on North street south of Saratoga, and no preparation had been made for laying them, and at the time the testimony was taken in the cause, this elevated structure was not completed, work being in progress at the north end near Eager street, nor had any preparation been made for laying the tracks on North street south of Saratoga. Saratoga is one block north of Lexington, and is the street at which this elevated structure is to terminate at its southern extremity. We do not see how in any way the city can be held responsible for the expense incurred under these circumstances by the construction of these Lexington-street tracks. To say the least, the expense was unnecessarily incurred after full knowledge of the purpose on the part of the mayor to recommend the passage of the repealing ordinance so soon as it could be effected.

The ordinance was promptly passed as soon as the city council met.

Considerable comment was made on the rights of way enjoyed by other passenger railway companies, and the supposed unfavorable effect on their interests of a decision in favor of the
257 city.

We may say once for all that we are dealing only with the case before us. Franchises and privileges granted by the legislature cannot be annulled by an ordinance of the mayor and city council.

We hold that ordinance No. 23 did not vest in the Lake Roland Company an irrevocable right in the streets. It is our most solemn duty to protect vested rights; and that duty we mean to perform to the extent of our ability by the exertion of all the powers conferred upon us by the constitution and the laws. As to other matters involved, the city's liability for damages, as above declared, will secure justice to those who may have incurred expense on the faith of privileges duly granted.

The bill of complaint in this case prayed for an injunction to restrain the city authorities from removing the tracks on Lexington street. The circuit court of Baltimore city passed a *pro forma* decree dismissing the bill with costs. It must be affirmed.

Decree affirmed with costs.

258 STATE OF MARYLAND, *sct:*

I, J. Frank Ford, clerk of the court of appeals of Maryland, do hereby certify that the foregoing is truly taken from the record of proceedings of the said court of appeals.

In testimony whereof I have hereunto set my hand as clerk, and affixed the seal of the said court of appeals, this 10th day of December, A. D. 1894.

[SEAL.]

J. FRANK FORD,
Clerk Court of Appeals of Maryland.

MEM.—The foregoing Exhibit No. 3 is thus endorsed: "Ordered this 12 Dec., 1894, that this duplicate of Defendants' Exhibit No. 3, filed April 26, 1893, be substituted in place of the one which has been lost.

THOS. J. MORRIS, *Judge.*"

259 "DEFENDANT'S EXHIBIT No. 4."

Filed April 26, 1893, with defendant's answer.

Court of Appeals of Maryland, April Term, 1893.

LAKE ROLAND ELEVATED RAILWAY COMPANY
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE and ALFRED E. SMYRK, City Commissioner.

Separate Opinion of Chief Judge Alvey on Motion for Re-argument.

When this case was originally decided by this court I fully concurred in the conclusion arrived at that it was competent to the mayor and city council of Baltimore to pass the repealing or restrictive ordinance No. 1, approved November 18th, 1892, limiting the appellant company to the use of a single track for its road on Lexington street between North and Charles street, and requiring it to remove the double tracks, as by the ordinance directed, and after careful consideration of the reasons assigned by the appellant for a re-argument of the case I remain of my former opinion.

The grounds of my judgment are briefly these: The mayor and city council, by statutory provision, are invested with express
260 authority "to regulate the use of the streets, lanes, and alleys of the city by railway or other tracks," and this, as I understand it, is but an amplification of their general power over and right and duty to regulate and maintain the streets and other highways of the city for the use of the public. It is quite clear that the act of 1892, ch. 112, has in no manner divested the mayor and city council of their power over the streets of the city upon which the tracks of the appellant may be laid, but, on the contrary, that statute is careful to reserve to the city "the same power and control hereafter in reference to the enforcement, amendment, or repeal of

said ordinance, as it has or would have in respect to any ordinance passed under its general powers." The ordinance referred to in this act is the ordinance No. 23, approved April 8th, 1891, under which the authority was first obtained from the city to lay railway tracks on Lexington street, and which was confirmed by the act of the General Assembly of 1892, ch. 112, with the reservation just stated.

This power to maintain and regulate the use of the streets of the city is a trust for the benefit of the general public, and the primary use of the streets is not, by any means, that of furnishing tracks for street railways. The mayor and city council cannot divest themselves of this trust nor can they so restrict their power over the streets as to defeat or seriously impair the beneficial enjoyment of
the streets by the public in the ordinary and usual modes of
261 passage thereon. The power vested in them in respect to the streets is of a legislative character, and they can neither restrict themselves nor their successors by any irrepealable ordinance in the exercise of such power over the streets except it be by the express authority of the legislature of the State. The power is a continuing one, to be exercised whenever the public needs may require it, and hence the power to regrade and improve the streets from time to time must remain subject to the judgment and discretion of the legislative branch of the municipal government. But if the contention of the appellant could be maintained the streets on which the railway tracks are once laid might and most generally would pass out of the control of municipal authority. For, however improvident or reckless might be the grant of privileges to street railway companies or however much their tracks might obstruct the use of the streets by the general public, perpetual easements or servitudes would be created in the streets, and the municipal authorities would be precluded from the exercise of the ordinary power of changing grades or making other improvements of the street that might materially interfere with the tracks or the operation of the road, though public necessity for such improvement might be never *to* urgent; and in such case the only means of reclaiming the street to the absolute control of the city authorities and to the general public use would be by a resort to the power of eminent domain. But in this case, to say nothing of the general
indefeasible nature of the legislative power vested in the
262 mayor and city council in respect to the streets, the express statutory reservation of the power to regulate the use of the streets by railways secures to the mayor and city council the paramount right at all times to control the street and to determine that no more than a single track shall be maintained thereon.

I am aware that it may be urged—and, indeed, it has been urged here, and it constitutes the full strength of the appellant's case—that, upon the principles that I have stated as the ground of my judgment, there would be no sufficient protection to the property rights in a street railway. But I am far from saying that such property rights are not entitled to protection. If, in reliance upon a valid ordinance, a railway company in good faith and without notice that the authority is about to be modified or withdrawn has

laid its tracks in the street of a city and the municipal authorities afterwards conclude that the grant of the privilege was improvident or detrimental to the public and require the tracks to be removed this can be enforced only upon principles of fair indemnity to the company. This is in accordance with a well-established principle in the case of an executed license, where, to entitle the licensor to revoke the license and to be restored to his former rights, he must do justice to the licensee by indemnifying him for the expense which he has reasonably incurred under the license, but not for prospective profits that might be realized. This measure of indemnity the principles of justice would seem to require in such case as I have just stated. See Addison *vs.* Hack, 2 Gill, 221.

263 The recent case of St. Louis *vs.* West. Union Tel. Co., 148 U. S., made the ground for the present application for re-argument, is supposed to be quite decisive of this case in support of the contention of the appellant. That case was decided by the Supreme Court after the argument of this case, and the opinion was not brought to our attention until after the opinion in this case was filed; but, upon careful examination of the opinion of the Supreme Court as delivered by Mr. Justice Brewer, I fail to perceive in what respect it can be regarded as having any decisive application to this case. That case is not like the present in any material respect. It was a proceeding to enforce the collection of a specific tax or rental assessed under an ordinance of the city of St. Louis upon each of a number of telegraph poles of the defendant erected along the streets of the city; and the right to enforce the collection of such tax or rental was denied by the defendant company upon the ground that such tax or rental was a mere privilege or license tax for the privilege of carrying on its business in the city, and that the assessment and attempted enforcement and collection of such tax were acts in violation of art. 1, sec. 8, paragraphs 3 and 7, of the Constitution of the United States. This defence was not sustained by the court. It is true the defendant as an additional defence contended that the city, by its ordinance, had contracted with the defendant to permit the erection of certain telegraph poles in the streets of the city in consideration of the right of the city

264 to occupy and use the top cross-arms of any such poles for its own telegraph purposes free of charge; but the court upon the facts of the case refuted that contention, and cited and quoted from certain State decisions relied on by the defendant, only to show that they had no application to the case. I do not find that there was anything decided in that case that supports the contention of the appellant here, nor do I think that the Supreme Court has in any case established a doctrine that supports the contention of the appellant.

I therefore think the motion for re-argument should be overruled.

STATE OF MARYLAND, *sct.:*

I, J. Frank Ford, clerk of the court of appeals of Maryland, do hereby certify that the foregoing is truly taken from the record of proceedings of the court of appeals of Maryland.

In testimony whereof I have hereunto set my hand as [SEAL.] clerk and affixed the seal of the said court of appeals this 25th day of April A. D. 1893.

J. FRANK FORD,
Clerk Court of Appeals of Maryland.

265 A $\frac{76}{1893}$.

"DEFENDANT'S EXHIBIT NO. 5."

Filed April 26, 1893, with defendant's answer.

Answer of Defendant.

Filed 26th April, 1893.

In the Circuit Court of Baltimore City.

LAKE ROLAND ELEVATED RAILWAY COMPANY
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE and ALFRED E. SMYRK, City Commissioner.

To the Honorable J. Upshur Dennis, judge of the circuit court of Baltimore city:

The answer of the Mayor and City Council of Baltimore and of Alfred E. Smyrk, city commissioner, to the bill in this court against them exhibited.

1. That, as appears by the records of this court, there was a suit brought against these respondents by the plaintiff herein to have the city authorities enjoined from removing the double iron railway tracks on Lexington street and to have ordinance No. 1, approved November 18th, 1892, declared null and void; that in this court the bill was dismissed *pro forma* by the court in pursuance of the agreement of counsel to be found on page 110 of the printed record
266 in that case, and the said record is hereby referred to as a part of this answer as fully as if incorporated herein; that it is also true that the court of appeals, with seven judges sitting in the case, came to the unanimous conclusion that the ordinance was valid, and that the decree dismissing the bill for injunction should be affirmed, as appears by the opinion of the court of appeals. The exact terms of the ordinance No. 1, approved November 18th, 1892, appears by a copy thereof herewith filed, marked Defendant's Exhibit No. 1, and prayed to be taken as a part hereof.

II. That the allegation in the bill of complaint of the plaintiff that there was any contract or agreement, express or implied, made in its

behalf with the mayor or the city solicitor or in regard to what its rights should be in the event of the former suit being decided in favor of the city is simply untrue. The matter was never discussed in the slightest particular. While the city's law officers would have the same right to make agreements as to matters connected with the trial of a pending case that any other attorneys would have, they have no authority to repeal the plain and peremptory words of an ordinance, no one in that regard having power to speak for the municipality except the duly elected city council, and if any such pretended agreement had been attempted to be made it would, under the familiar rulings of the court of appeals of Maryland, have been *ultra vires* and void. See 18 Md., 282, Mayor, &c., *vs.* Eschbach,
where the elementary rule is thus plainly laid down: "The
267 law makes a distinction between the effect of the acts of an officer of a corporation and those of an agent of a principal in common cases. In the latter the extent of the authority is necessarily known only to the principal and the agent, while in the former it is a matter of record in the books of the corporation or of public law. A municipal corporation cannot be held liable for the unauthorized acts of its agents, although done *officii colore*, without some corporate act of ratification or adoption." See also 21 Md., 50, Mayor, &c., *vs.* B. & O. R. R.

The above reference to the authorities shows that no such pretended contract as alleged in the bill of complaint could have been made; the personal recollection of the city's officers makes them positive that no such pretended contract was ever attempted to be made, and the following statement, on page 21 of the printed brief of the plaintiff herein in the court of appeals in the former case, shows that it never was believed by the plaintiff's representatives that there was in law or fact any such contract as is now pretended, "and the court will therefore observe that if this ordinance is valid, as the company did not remove its double tracks within twenty days, but instead filed this bill, all its rights to have any tracks on Lexington street are gone." This brief was signed by Bernard Carter and William A. Fisher, as well as by the present solicitors for the plaintiffs. That statement in the brief filed on the — day of —— precludes the supposition that at the time the brief was
signed and filed any of the gentlemen whose names were
268 signed to it supposed the ordinance had any different meaning or would have any other effect from what they themselves attributed to it.

To hold that the plaintiff is now correct would be to imply that the counsel were making a deliberate attempt to deceive the court, were trying to make the court believe that the ordinance would work a hardship upon them which they knew it would not work. It is submitted it will take considerably more than the bill filed in this case to make any court in Maryland believe so incredible a thing.

III. That a full and true statement of what really did occur between counsel will be found in the letter from the city solicitor to the mayor of the city, dated March 27th, 1893, a copy of which is

herewith filed, marked Defendant's Exhibit No. 2, and prayed to be taken as a part hereof.

IV. That on the morning of March 18th, 1893, the city commissioner called at the office of the city solicitor and requested instruction as to the notice to be given the Lake Roland Company to remove their double iron tracks. In looking over the ordinance, the terms of which, although he had drawn it, were not then present in his mind, the city solicitor observed the peremptory language in which removal of the double tracks within twenty days from the passage of the ordinance is made a condition precedent to the right of the company to have a single track on Lexing-
269 ton street. The city solicitor and the city commissioner then went to the mayor's office, and the city solicitor there informed the mayor that in his view a new ordinance was necessary to enable the company to maintain a single track on Lexington street. Then the city solicitor went to the office of Steele, Semmes and Carey and informed them that in his opinion a new ordinance was necessary. They seemed also to take that view, and Mr. Semmes said that he would draw one at once. Late in the afternoon Mr. Carey called at the city solicitor's office, and, for the first time, spoke of an understanding between counsel with regard to the case. After talking with him and stating that he could not state there was any contract, the city solicitor said he would write a letter to the mayor placing the facts as favorably for the Lake Roland Company as he could consistently. He then wrote the letter referred to in the bill of complaint and handed it to Mr. Carey.

On the 20th of March, 1893, there was a meeting between the city counselor, the city solicitor, the president of the plaintiff, and Mr. Carey, in which both the city solicitor and the city counselor expressed their desire not to bear any more harshly on the plaintiff than was necessary to the discharge of their duty, and in which, after considerable hesitation, the city solicitor said that he would verbally instruct the city commissioner to locate the tracks for the Lake Roland Company, and he did so inform the city commissioner that morning. That evening, after more mature reflection, the city solicitor came to the conclusion not only that his former
270 opinion was clearly right, but that it was beyond his power and in conflict with his duty to informally advise, contrary to the plain words of the ordinance, the city commissioner to locate the single tracks on Lexington street because he desired not to press over heavily the plaintiff (whose officers had up to that time been very fair-spoken and courteous), and because he did not individually consider that one track would be injurious to the public interests.

He therefore, on the next morning, viz., March 21st, 1893, wrote to Mr. McLane, the president of the plaintiff, a letter, of which a copy is filed herewith, marked Defendant's Exhibit No. 3, and which is prayed to be taken as a part hereof. This letter was sent to Mr. McLane by a special messenger and was received by him before one stroke of work was done, relying on the interview of the previous day. That same afternoon Mr. Semmes, one of the counsel of the plaintiff, called at the office of the city solicitor and then

had the letter sent that morning to Mr. McLane in his hand. The next morning, viz., Wednesday, March 22nd, when the city solicitor and the mayor were talking in the private office of the mayor, on St. Paul street, Mr. Semmes came into the office with the draft of a message he desired the mayor to send to the city council advocating the passage of an ordinance confirming the right of the Lake Roland Company to a single track on Lexington street. This ordinance he said he would submit to the city solicitor in the course of the day. The city solicitor then and there made some modi-
271 fications of the statements in the message as to there being a doubt as to the right of the Lake Roland Company to maintain two tracks on Lexington street. A few days afterwards Mr. Semmes sent to the mayor a draft of a message he desired submitted to the council, which is hereby referred to as Exhibit 4, which is prayed to be taken as a part hereof. That afternoon, when going to the bar library, the city solicitor observed men at work on the single track and who had apparently just started to work. He immediately went into the Imperial hotel, which is near by, and, as a matter of friendly warning, telephoned Mr. Semmes that he, the city solicitor, saw men at work on the tracks; that he personally desired to see the company get its permit to lay the tracks, but that if they they went ahead, bull-headed, it would be impossible for him to aid them in doing so. To this Mr. Semmes made some courteous response, and the next morning Mr. Carey called on the city solicitor and there stated that what they were doing they were doing under legal advice and with the knowledge of the mayor and city commissioner, and that they did not desire the aid of the city solicitor in obtaining any legislation from the city council.

V. That the preliminary injunction in this case was improvidently issued because the proper exhibits were not filed with the bill of complaint and because the bill on its face shows no proper grounds for an injunction.

The bill should be dismissed because there was in it no
272 full, free, and frank disclosure of the facts in the case.

VI. That so far as the allegations in this suit could have been or were made in the former suit in this court between the same parties, which suit was commenced on November 30th, 1892, these defendants rely upon the decree in the said former suit as *res adjudicata* and insist that the same precludes the plaintiff from raising the said questions a second time in this suit.

VII. That these respondents require strict and full proof of each and every allegation of this bill not herein expressly admitted.

VIII. Having fully answered, these defendants pray to be hence dismissed with their reasonable costs.

WILLIAM S. BRYAN, JR.,
City Solicitor.

STATE OF MARYLAND, *Baltimore City,* } *sct:*

I hereby certify that on this eighth day of April, in the year eighteen hundred and ninety-three, before me, the subscriber, a jus-

tice of the peace of the State of Maryland, personally appeared Ferdinand C. Latrobe, mayor; Alfred E. Smyrk, city commissioner, and William S. Bryan, Jr., city solicitor, and made oath in due form of law that the matters and facts in the aforegoing answer set forth are true to the best of their knowledge, information, and belief.

ANDREW J. COLLARS, *J. P.*

273 STATE OF MARYLAND, *City of Baltimore,* } *sct:*

I, Alvin Robertson, clerk of the circuit court of Baltimore city, do hereby certify that the above is a true copy of the original answer of defendant filed April 26th, 1893, and now on file in this office in the above-entitled cause.

In testimony whereof I hereto set my hand and affix the [SEAL.] seal of the circuit court this 26th day of April, A. D. 1893.

ALVIN ROBERTSON,
Clerk of the Circuit Court of Baltimore City.

274 "DEFENDANT'S EXHIBIT NO. 5½."

Filed April 26, 1893, with defendant's answer.

In the Circuit Court of Baltimore City.

LAKE ROLAND ELEVATED RAILWAY COMPANY
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE and ALFRED E. SMYRK, City Commissioner.

Ordered this 5th day of April, in the year eighteen hundred and ninety-three, by the circuit court of Baltimore city, on the foregoing bill of complaint and affidavit, that a writ of injunction be issued as prayed in said bill upon the filing of a bond by the plaintiff in the penalty of two thousand dollars, with security to be approved by the clerk of this court; but liberty is hereby reserved to the defendant to move for the rescinding of this order and for a dissolution of the injunction to be issued as aforesaid at any time after filing their answer to said bill on giving the plaintiff five days previous notice of such motion; and the clerk is hereby directed to annex a copy of this order to the writ of injunction.

HENRY D. HARLAN.

275 I hereby certify that the above is a true copy of the order directing injunction to issue, passed by the circuit court of Baltimore city in the said cause, and that the complainant therein named has filed its approved bond as by the terms of said order required.

In testimony whereof I hereunto set my hand and affix the seal of the said circuit court of Baltimore city this 5th day of [SEAL.] April, in the year of our Lord one thousand eight hundred and ninety-three.

ALVIN ROBERTSON, *Clerk.*

276 "DEFENDANT'S EXHIBIT NO. 6."

Filed April 26, 1893, with defendant's answer.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
MAYOR AND CITY COUNCIL OF BALTIMORE.

In the Circuit Court of the United States in and for the Maryland District.

Affidavit of Ferdinand C. Latrobe, Mayor of Baltimore.

Before me, the clerk of the circuit court of the United States in and for the Maryland district, personally appeared, on the 26th day of April, 1893, Ferdinand C. Latrobe, mayor of Baltimore, and made oath in due form of law as follows: The testimony I gave in the case of The Lake Roland Elevated Railway Company *vs.* The Mayor and City Council of Baltimore, brought in the circuit court of Baltimore city, and to be found on pages 99 to 106 of the Record in that case, printed after it got to the court of appeals, a certified copy of which record is filed with the answer in this case, marked "Defendant's Exhibit No. 2," is true.

I never heard, from any source, of any agreement or understanding between counsel in the case of the Lake Roland Elevated Railway Company against the city as to what rights the company should have in the streets if the city should win that case. I was never a party to such an agreement and never sanctioned it in any way.

The allegation in the bill in this case that the ordinance No. 1, of November 18th, 1892, which I recommended to the city council, was designed to needlessly oppose and harm the Lake Roland Elevated Railway Company, is scandalously and shamelessly false.

I never requested Mr. James L. McLane, as stated in his letter of April 3d, 1893, incorporated in the bill of complaint, to have a consultation with the city counsellor and the city solicitor.

I never stated to any one I would not approve an ordinance granting them a single track, unless the ordinance contained a condition that the company should have their main office in the city of Baltimore.

I made no statement on that subject until after the case was decided. I may have stated that the city council might probably add an amendment to the proposed ordinance to give them a singe track, a proviso, requiring them to pay their taxes in the city of Baltimore, but this was a mere matter of opinion.

FERDINAND C. LATROBE, *Mayor.*

Sworn to before me this 26th day of April, A. D. 1893.

JAS. W. CHEW,
Clerk Circuit Court U. S.

277 "DEFENDANT'S EXHIBIT NO. 7."

Filed April 26, 1893, with defendant's answer.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
MAYOR AND CITY COUNCIL OF BALTIMORE.

In the Circuit Court of the United States in and for the Maryland District.

Affidavit of William S. Bryan, Jr., City Solicitor of Baltimore.

Before me, the clerk of the circuit court of the United States, in and for the Maryland district, personally appeared on this twenty-sixth day of April, 1893, William S. Bryan, Jr., city solicitor, and made oath in due form of law as follows: I gave the original opinion to Mayor Latrobe, that ordinance No. 23 of April —, 1891, was not an irrepealable contract, and I drew the ordinance No. 1, approved November 18, 1892.

I, on November 7th, 1892, wrote to Mr. McLane, informing him that I would prepare an ordinance to prohibit the North Avenue R. R. Company from laying or maintaining more than a single track on Lexington street, between North and Calvert, (see pages 6 and 7 of printed record of the case of Lake Roland Elevated Railway Company *vs.* M. & C. C. of Balto., and A. E. Smyrk, a certified copy of which is intended to be filed with the answer in this case). A few days latter, (the bill of complaint in former case says on November 12, 1892, but I feel sure it was on November 11), Messrs. Jas. L. McLane and John E. Semmes saw the draft of the ordinance, and of my opinion to the mayor in my office.

As soon as this ordinance was passed, that is, within a day or so thereafter, and I believe, before it was approved by
278 the mayor, Mr. John E. Semmes, one of the counsel for the Lake Roland Company, conferred with Mayor Latrobe and myself about the speediest method of having the controversy settled; I expressed a willingness to either file a bill on behalf of the city or to let the company file a bill. They elected to themselves — file a bill against the city.

To put their company in the position to do this, it was deemed necessary for the city to give notice that the tracks should be removed, so that there would be a danger of an invasion of what would be the rights of the company if their counsel's view was correct. I therefore, at Mr. Semmes' request, dictated the notice which the city commissioner signed, requiring them to remove their tracks. As I knew that the company intended to resist the repealing ordinance, and as the notice was given to enable them to at once file their bill for an injunction, of course neither party expected Captain Smyrk's notice to be obeyed when it was issued. It was given merely to place the Lake Roland Company in a position to apply at

once for an injunction. Both the counsel for the Lake Roland Company and for the city were anxious to have the case tried speedily in the court of appeals; they were very solicitous on that point; they seemed to fear that the matter being in doubt might interfere with some of their financial negotiations. Mr. Semmes brought the original draft of their bill of complaint to me, and an effort was made between us to have the bill so worded that the city could demur to it and a *pro forma* decree be passed dismissing the bill, and have the case taken to the court of appeals at once. We had a number of interviews for that purpose. I stated that I would unite with him in an endeavor to get the court to take it up at the then pending term, (the October term, 1892.) This fell through, owing to the company's counsel being unwilling to place in the bill some allegations which my colleague, the city counselor, considered important to have there if we were to demur to the bill.

279 They then filed their bill, and the city filed its answer, and the testimony was taken.

While therefore, I can recall no express agreement on the subject, and indeed, with the exception of one occasion in the circuit court of Baltimore city, when the order to show cause why the injunction should not issue was being signed, when I told Mr. Bernard Carter that the city commissioner would not tear up the tracks before the case was heard and determined, I can recall no particular conversation I had on the subject of the tracks with any of the counsel for the company. I felt, and still feel, however, that it was mutually understood between the Lake Roland Company and myself, that the company would not proceed further with its work on Lexington street pending that suit, (although no express promise was ever made me to that effect,) and that the city would not tear up the tracks already laid, but that until there was a decision by the court of appeals things should stand *in statu quo*.

This is the extent of any agreements or understandings between us. So far as I can now recall, there was no interview before the decision of the court of appeals between myself and any of the counsel of the Lake Roland Company, in which the question of their right in the streets in case the city should win the case, was discussed.

After the case was decided by the court of appeals, on March 18th, 1893, the city commissioner came to my office to advise with me about the notice given the Lake Roland Company to remove their double tracks. In looking over the ordinance, the terms of which, although I had drawn it, were not then present in my mind, I observed the peremptory language in which the removal of the double tracks is made a condition precedent to the right of the company to have a single track on Lexington street, and thought and still think, that under a proper construction of the ordinance, they had lost that right.

280 I then went with the city commissioner to the mayor's office, and there informed the mayor that in my opinion, a new ordinance was necessary to enable the company to maintain a single track on Lexington street.

On leaving the mayor's office, I went to the office of Messrs. Steele, Semmes & Carey, and informed Mr. Semmes that I thought a new ordinance was necessary. Mr. Carey and Mr. Steele were both in their offices and I had some little conversation with them, but the main portion of my talk was with Mr. Semmes. He seemed to acquiesce in the necessity for a new ordinance and stated that he would draw one. Late in that afternoon Mr. Carey came to my office, and for the first time spoke of an understanding between counsel in regard to the case; after talking with him and stating that I could not state there was any contract, I said I would write a letter to the mayor, placing the facts as favorably for the Lake Roland Company as I could consistently. I then wrote the letter of March 18th, referred to in the bill in the case pending now in circuit court of Baltimore city. On March 20th, 1893, I went to the city hall and there told the city commissioner in the mayor's office, not to locate the tracks for the Lake Roland Company until he heard from me again. I then went to the city counselor's office to confer with him about this and other city matters. While there, I went down to Judge Fisher's office and asked him to come up to Mr. Hayes' room to talk the matter over. He telephoned either with my consent or at my suggestion, for Messrs. McLane and Carey.

In a short time Messrs. McLane and Carey came up to Mr. Hayes' office without Judge Fisher.

A conference lasting some time was held, in which I, and I believe Mr. Hayes also, expressed the desire not to bear any more harshly on the Lake Roland Company than was necessary for the discharge of our official duty. After considerable hesitation,
281 I finally said I would verbally tell the city commissioner to locate the single track for the company.

I then went to the city commissioner's office, and from there to the office of the Lake Roland Company, diagonally across the street, where I found him. I told him to locate the single track for the company.

From that time to the eighth of April, I never saw the city commissioner, and had no communication with him, direct or indirect.

After more mature reflection that evening and the next morning, I came to the conclusion not only that my former opinion was clearly right, but that it was beyond my power and in conflict with my duty, to informally advise the city commissioner to locate the tracks of the Lake Roland Company, contrary to the plain words of the ordinance, because I did not desire to press over heavily on the Lake Roland Company, and because I did not individually consider that one track would be injurious to the public interests. I, therefore, on the next morning, March 21, 1893, wrote to Mr. James L. McLane, the president of the Lake Roland Company, the letter of which a copy is filed herewith marked "Defendant's Exhibit J. L. McL." This letter I gave to Mr. Charles S. Rich, with a request to deliver it to Mr. McLane at his office. This letter is not referred to in the bill. The same afternoon Mr. Semmes called at

my office with this letter in his hand. The next morning, March 22d, 1893, while I was talking in his private office on St. Paul street with Mayor Latrobe, Mr. Semmes came into the room with the draft of a message he desired the mayor to send to the city council advocating the passage of an ordinance confirming the right of the Lake Roland Company to a single track on Lexington street. The ordinance he said he would submit to me during the day. I then suggested some modifications in the message. That afternoon, while going to the bar library to prepare for the trial of a case for the Pull-
282 man Palace Car Co., which I tried that week in the superior court, I observed some men at work on the single track who had apparently just started to work. I immediately went to the Imperial hotel, which is near by, and as a matter of friendly warning, telephoned Mr. Semmes that I saw men at work on the tracks; that I personally desired to see the company get its ordinance, but that if they went ahead bullheaded, I could not or would not aid them in doing so. To this Mr. Semmes made some courteous response. The next morning Mr. Carey called to see me in the law library, I was just getting ready to go into court. He stated to me that what they were doing, they were doing under legal advice, and with the knowledge of the mayor and city commissioner, and that they did not desire my aid in obtaining any legislation from the city council.

The statement in the bill that I changed my opinion after the tracks were laid is, as above shown, untrue.

On April 1st, when it is alleged the city commissioner received orders from me, I was in New York city.

I should have stated that on the night of March 21st, I, in looking over the brief of the Lake Roland Company in the case in the court of appeals of Maryland, I noticed that on page 21, under the heading of the "extent of the claim," the following language in italics:

"The court will therefore observe, that if this ordinance is valid, as the company did not remove its double tracks within 20 days, but instead, filed this bill, all its rights to have any tracks on Lexington street are gone."

I immediately dropped a postal card to Mr. Semmes to show him how groundless was any claim that there was any understanding by which I had attempted to prevent the Lake Roland Company from losing their right to a single track by not taking up the tracks in twenty days.

WILLIAM S. BRYAN, JR.

Sworn to before me.

JAS. W. CHEW, *Clerk.*

283 "DEFENDANT'S EXHIBIT J. L. McL."

Filed April 26, 1893, with foregoing Exhibit No. 7.

Law department mayor and city council of Baltimore, William S. Bryan, Jr., city solicitor.

BALTIMORE, *Mar.* 21*st*, 1893.

James L. McLane, Esq., president of the Lake Roland Elevated Company.

DEAR SIR: After more mature reflection and further consultation with the city counsellor, I am convinced that my first impression in regard to the necessity of an additional ordinance to enable your road to run its single track on Lexington street was correct. The language of the third section is imperative, your company can have no right to place or maintain a track on Lexington street, without further legislation from the council.

I write you at once, so that no steps may be taken, and no expense incurred by your company in reliance upon our talk of yesterday in Mr. Hayes' office.

Yours truly, WILLIAM S. BRYAN, JR.,
City Solicitor.

284 *Affidavit of William P. Twamley.*

Filed April 26, 1893, with defendant's answer.

In the Circuit Court of the United States in and for the Maryland District.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
MAYOR AND CITY COUNCIL OF BALTIMORE.

Before me, the clerk of the circuit court of the United States in and for the Maryland district, personally appeared on this 24th day of April, 1893, William P. Twamley and made oath on the Holy Evangely of Almighty God that the testimony given by him in the circuit court of Baltimore city in the case of the Lake Roland Elevated Railway Company *vs.* Mayor and City Council of Baltimore *et al.*, and to be found on pages 92 to 96 in the printed record of that case, a certified copy of which is filed with the answer in this case and marked "Defendant's Exhibit No. 2," is true and correct.

WM. P. TWAMLEY.

Sworn to before me 24th April, 1893.

JAS. W. CHEW,
Clerk Circuit Court U. S. District of Md.

285 *Affidavit of A. E. Smyrk, City Commissioner.*

Filed April 26, 1893, with defendant's answer.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
MAYOR AND CITY COUNCIL OF BALTIMORE.

In the Circuit Court of the United States in and for the Maryland District.

Before me the clerk of the circuit court of the United States in and for the Maryland district, personally appeared on this 24th day of April 1893, Alfred E. Smyrk, city commissioner of Baltimore, and made oath in due form of law,

1. That the only approval he ever gave to the laying of the double tracks by the Lake Roland Elevated Railway Company on East Lexington street, was in the modified form and as qualified by the endorsement on the plat submitted to him of the tracks of the said company, between North and Calvert streets; a true copy of this endorsement is found in Plaintiff's Exhibit No. 8, to be found on page 27 of the printed record of the case of The Lake Roland Railway Company *vs.* The Mayor and City Council of Baltimore, and A. E. Smyrk, in the court of appeals of Maryland, a duly certified copy of which is to be filed with the answer of the defendant in this case, and marked "Defendant's Exhibits No. 2." He had no record or recollection or ever having in any way, direct or indirect, approved of any location for said tracks between Calvert and Charles streets.

2. On Monday March 20th, 1893, acting under the advice of the city solicitor, he first refused to approve any location of a single track on Lexington street. Afterwards, about the middle of
286 the same day, the city solicitor came in person into the office of the Lake Roland Company, at the corner of North and Lexington streets, where this affiant then was reiterating the statement that he could not locate the single track on Lexington street. The city solicitor then told him that he had just had a conference with the counsel and president of the Lake Roland Company and to go ahead and locate a single track. From that verbal interview until April 8th, 1893, when he saw the city solicitor for the purpose of swearing to an answer then proposed to be filed in the second case between the Lake Roland Elevated Railway Company and the Mayor and City Council of Baltimore and A. E. Smyrk, city commissioner, he neither saw the said city solicitor nor had any communication with him direct or indirect.

A. E. SMYRK,
City Comm.

Sworn to before me this 24th April, 1893.

JAS. W. CHEW,
Clerk Circuit Court U. S., District of Maryland.

287 *Affidavit of Ruel Keith Compton.*

Filed April 26, 1893, with defendant's answer.

In the Circuit Court of the United States in and for the Maryland District.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
MAYOR AND CITY COUNCIL OF BALTIMORE.

Before me, the clerk of the circuit court of the United States in and for the Maryland district, personally appeared on this 24th day of April, 1893, Ruel Keith Compton, and made oath in due form of law that the testimony given by him in the case of the Lake Roland Elevated Railway Company *vs.* The Mayor and City Council of Baltimore, and another in the circuit court of Baltimore city, and to be found on pages 82 to 85 of the printed record of that case in the court of appeals of Maryland, a copy of which duly certified is filed with the answer in this case, and marked Defendant's Exhibit No. 2, is true and correct, and he hereby reaffirms the same and prays it to be taken as a part of this affidavit.

RUEL KEITH COMPTON.

Sworn to before me—

JAS. W. CHEW,
Clerk Circuit Court U. S., District of Maryland.

288 ADDITIONAL AFFIDAVITS FILED BY PLAINTIFF.

289 *Affidavit of James L. McLane.*

Filed April 29, 1893.

In the Circuit Court of the United States for the District of Maryland. (In Equity.)

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE *et al.*

I hereby certify that on this 28th day of April, in the year eighteen hundred and ninety-three, before me, the subscriber, a commissioner of the United States for the district of Maryland, personally appeared James L. McLane and made oath in due form of law as follows:

That he is president of the Lake Roland Elevated Railway Company.

That he has read the bill of complaint filed in the above-entitled cause by the Baltimore Trust and Guarantee Company, trustee, and

that he believes it to be in every respect a full, accurate and fair statement of the matters and things set forth in said bill.

That he has read the affidavit filed in the above-entitled cause by Edward H. Bouton, secretary of the Lake Roland Elevated Railway Company, and that it correctly states the exact facts in regard to the issue of the bonds of the Lake Roland Elevated Railway Company, and that the proceedings and resolutions of the directors and stockholders of the said company are correctly copied from the minutes of the proceedings of said directors and stockholders.

That it is not true that anything whatever was done, either by this affiant or the said Lake Roland Elevated Railway Company, or by the said trustee or by the said bondholders, for the purpose of obtaining the jurisdiction of this court, or for any purpose whatever connected with said litigation.

That the right of the said Jarvis and Conklin to all of said bonds was vested in them by reason of the acceptance of their proposition by the stockholders and directors on August 6, 1892, and that the board of directors of said company delivered all the bonds to them as soon as they made a demand for the same.

That so far from there being any foundation for the insinuations contained in the answer of the defendant in the above-entitled cause, as a matter of fact, the said Jarvis and Conklin, and the syndicate of bondholders operating with them had, prior to the passage of said repealing ordinance, practically effected a sale of a large block of said bonds, but upon the passage of the said repealing ordinance, which in effect asserted the right of the municipal corporation to arbitrarily oppress the said Lake Roland Elevated Railway Company, the purchaser stopped the negotiations.

That the full and frank statement contained in the affidavit of the said Edward H. Bouton will fully answer all the inquiries made in the answer of the defendant in regard to said bonds, and show to this honorable court the entire good faith of said trustee and said bondholders in their appeal to this honorable court for protection, and the gross injustice and injury which would be done to said bondholders if they were stripped of the protection afforded to their contract by the Constitution of the United States.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

[SEAL.]

290 *Affidavit of L. N. Frederick.*

Filed April 29, 1893.

In the Circuit Court of the United States for the District of Maryland. (In Equity.)

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

I hereby certify that on this 29th day of April, in the year eighteen hundred and ninety-three, before me, the subscriber, a

commissioner of the United States for the District of Maryland, personally appeared Lawrence N. Frederick and made oath in due form of law that he is the superintendent of the Lake Roland Elevated Railway Company.

That the mayor and city council of Baltimore has by ordinance, approved by Mayor Latrobe, authorized the North Baltimore Passenger Railway Company to adopt the trolley electric system on Charles street, between Saratoga street and German street.

That the iron poles for said system have been erected on said street under the express authority and with the designation of location of the city commissioner with the approval of the mayor.

That new double iron railway tracks are now being laid by the said corporation (which is now owned by the Baltimore Traction
291 Company) on said Charles street, between Saratoga street and German street, under the express authority and direction of the city commissioner with the approval of the mayor, for the purpose of operating electric cars thereupon, and that said railway on Charles street, between Saratoga street and German street, will be operated in the same manner as will the railway of said Lake Roland Company on Lexington street, and that said sanction of the city commissioner and of the mayor have been given for said double tracks and for said electric poles and wires since the passage of the Lexington-street repealing ordinance of November 18th, 1892.

LAWRENCE N. FREDERICK.

Subscribed and sworn to before me this 29th day of April, A. D. 1893.

ISAAC BROOKS, JR.,
United States Commissioner in and for the District of Maryland.

292 *Affidavit of Randolph Barton.*

Filed April 29, 1893.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee, }
vs. }
THE MAYOR AND CITY COUNCIL OF BALTIMORE. }

I hereby certify that on this twenty-ninth day of April, in the year eighteen hundred and ninety-three, before me, the subscriber, a commissioner of the United States for the district of Maryland, personally appeared Randolph Barton, and made oath in due form of law that he is engaged in business (being of the law firm of Barton & Wilmer) at No. 207 North Calvert street, in the city of Baltimore, in which building he has himself an interest; that he has no interest whatever, except as a citizen and taxpayer of Baltimore city, in the controversy between the municipal corporation

and the Lake Roland Elevated Railway Company, but that he has carefully followed the contest and that it is his deliberate opinion that Mayor Latrobe has made a mistake in assuming that a single track will retard progress over Lexington street less than a double track, and that he is convinced that a double track will facilitate the use of the street more than a single track, and that travel along the street is less likely to be blocked with double tracks than if no tracks are laid at all.

RANDOLPH BARTON.

293 Subscribed and sworn to before me this 29th day of April, A. D. 1893.

ISAAC BROOKS, JR.,
United States Commissioner in and for the District of Maryland.

294 *Affidavit of Richard J. Capron.*

Filed April 29, 1893.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

I hereby certify that on this 29 day of April, in the year eighteen hundred and ninety-three, before me, the subscriber, a commissioner of the United States for the district of Maryland, personally — Richard J. Capron and made oath in due form of law as follows:

That the Lake Roland Park Company of Baltimore City, of which he is a director, is an occupant of Manufacturers' Record building at the northwest corner of Lexington and North streets in the city of Baltimore, which building is seven stories high and fronts fifty feet on the north side of Lexington street between North street and Calvert street, with its two main entrances on Lexington street; that said building is owned by Jarvis and Conklin, and is occupied by offices; that the Roland Park Company is in favor of double tracks on Lexington street, partly because the Lake Roland Railway Company connects Roland park with the centre of the city, and it is of vital importance to said Roland Park Company that said Lake Roland Company should be successfully operated to the corner of Lexington and Charles streets; and partly because said Roland Park Company believes that double tracks on Lexington street in front of said Manufacturers' Record building will increase the value of said Manufacturers' Record building and make it more convenient for tenants.

That of the other large buildings on Lexington street, between North street and Charles street, are the following:

(1.) The new "Law buildings," owned by Joseph M. Cone, who

has signed a petition filed in this court in favor of double tracks, which "Law buildings" have a front of ninety feet, more or less, on Lexington street, between St. Paul and Charles streets, and are seven stories in height.

(2.) The Metropolitan savings bank, which owns all the property on the north side of Lexington street, between Davis street and Calvert street, (a front of about ninety feet,) which bank has signed a petition filed in this court in favor of double tracks.

(3.) The Central Savings Bank of Baltimore, which owns the "Central Savings Bank building," which is five stories high
295 and which has a front on Lexington street of eighty-nine feet, between St. Paul street and Charles street (on the south side,) which has filed an affidavit in this court showing its approval of double tracks.

(The said Manufacturers' Record building, Law buildings and Central Savings Bank building are all entirely new buildings, and are regarded among the most substantial and attractive office and bank buildings in the city.)

(4.) The Greenmount Cemetery buildings, owned by P. Hanson Hiss and wife, who have filed an affidavit in support of said double tracks in this court, which building has a front of twenty-five feet on the north side of Lexington street, between St. Paul and Charles street.

(5.) The Vansant building, on the north side of Lexington street, between North street and Calvert street, is owned by Edwin F. Abell, who has expressed no disapproval of said double tracks, unless the editorial utterances of the Baltimore Sun, of which he is one of the largest owners, can be deemed an expression of his views.

Wherefore this affiant shows that, in connection with other petitions and affidavits filed in this cause, it is the wish of persons doing business and owning property on Lexington street, between North street and Charles street, that the Lake Roland Company should be permitted to lay double tracks on said street, and that the action of the mayor and city council in attempting to confine said Lake Roland Company to a single track, was against the wishes and interests of persons owning property and doing business on said street, who are certainly best able to judge whether double tracks will be an injury or advantage to said street.

RICHARD J. CAPRON.

Subscribed & sworn to before me this 29th day of April, A. D. 1893.

ISAAC BROOKS, JR.,
United States Commissioner in & for the District of Maryland.

296 *Additional Affidavit of E. C. Eichelberger.*

Filed April 29, 1893.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

I hereby certify that on this 27th day of April, in the year eighteen hundred and ninety-three, before me, the subscriber, a commissioner of the United States for the district of Maryland, personally appeared Edward C. Eichelberger and made oath in due form of law that he is one of the signers of the subjoined statement of approval of two tracks on Lexington street, dated April 20th, 1893; that the other signatures of the parties signing said statement were made in his presence and are the genuine signatures of the said parties; that to the best of his knowledge and belief none of the parties signing said statement have any interest in said Lake Roland Company further than expressed in said statement, and that said statement expresses the real and *bona fide* opinion of the parties signing the same.

EDWARD C. EICHELBERGER.

Subscribed and sworn to before me this 27th day of April, A. D. 1893.

ISAAC BROOKS, JR.,
United States Commissioner for the District of Maryland.

297 BALTIMORE, *April 20th*, 1893.

The undersigned, engaged in business on Lexington street between North street and Charles street, at the addresses set opposite to our respective names, are in favor of the construction and maintenance of two tracks on said street by the Lake Roland Elevated Railway Company:

Name.	Address.
William Merriken	110 East Lexington street.
Henry F. Spalding	108 " " "
John F. Williams	24 " " "
Frank Curbin	Orphans' court.
H. Stockbridge	Law building.
Daniel L. Brinton	" "
George E. Keenan	" "
Adrian Hughes	" "
John Ryan	208 East Lexington street.

David S. Briscoe	Law building.
C. C. Speed	" " 520.
F. B. Speed	" "
Alfred Hughes	" "
E. W. Turner	" "
John T. Owen	" " 501.
C. J. Owen	" " 501.
W. H. H. Anderson	" " 109.
E. P. Callow	102 East Lexington street.
John W. Walter	102 " " "
John P. Clark	N. W. cor. Lexington and Calvert Sts.
Hugh O'Brien	120 East Lexington street.
Geo. F. Dardon	200 Calvert street.
Clarence S. Hayden	200 East Lexington street.
H. Marcus Dennison	200 " " "
S. J. Martenet & Co.	208 " " "
A. A. Perry	210 " " "
Milton P. Paret	210 " " "
H. W. Fox	210 " " "
D. G. Waring	210 " " "
Chas. W. Jackson	210 " " "
Geo. W. Byrd	216 " " "
National Building and Supply Company	Manufacturers' Record building.
Manufacturers' Record Publishing Company	Lexington and North streets.
Alcaeus Hooper	" " " "
S. Eccles, Jr.	" " " "
Augustus F. Colbert	" " " "
L. A. Colbert	118 East Lexington street.
Victor Smith	114 " " "
Howard Bryant	112 " " "
D. M. Hite	9 " " "
Hugh Caperton	106 " " "
Edw. C. Eichelberger	114 " " "

298 *Affidavit of W. H. Buckler (with Cuttings).*

Filed April 29, 1893.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

I hereby certify that on this 28th day of April, in the year eighteen hundred and ninety-three, before me, the subscriber, a commis-

sioner of the United States for the district of Maryland, personally appeared William H. Buckler and made oath in due form of law that the subjoined editorial extracts are taken from the five newspapers of largest circulation published in the English language in the city of Baltimore, namely, the Baltimore American, Morning Herald, World, the Sun, and the News.

WM. H. BUCKLER.

Subscribed and sworn to before me this 28th day of April, 1893, at the city of Baltimore, within the district of Maryland.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

299 Baltimore American and Commercial Advertiser.

SUNDAY, *April* 16, 1893.

The Lake Roland Railway.

It has been a matter of much regret to most of the citizens of Baltimore that the Lake Roland railway has been almost constantly blocked in its plans by the city authorities. The difficulties of the company, which represents several millions of new investment in this State, have undoubtedly served to discourage other capital from coming here, and the policy of hampering it is unquestionably obnoxious to the people. Something must be done to settle the difficulty. The road is practically ready for operation, and the condition of Lexington street cannot be allowed to remain as it is.

Yesterday the corporation took another step. The Baltimore Trust and Guarantee Company, as trustee for the mortgage bonds, applied to the United States circuit court for an intervention to prevent the mayor and city council from interfering with the company's rights on Lexington street. The bill of complaint is worth reading as a review of the difficulty from the company's standpoint. It shows that the company has taken a bold stand for its rights. It claims that the repealing ordinance of last November was unconstitutional, and that it was "a wanton, arbitrary and illegal attempt to oppress" the Lake Roland Company. It wants a restraining order for the protection of its single tracks, and it renews its fight for the double track. It gives interesting facts to show that Lexington and Charles streets are of the same width, that the travel on Charles street is much greater than on Lexington, and that if a double track is safe on Charles street, there is no reason to believe that it would be dangerous on Lexington street.

It is gratifying to know that there will, from all indications, be a prompt hearing of the case. The public will hope that it will end in an early settlement of the troubles, so that the company may put in operation the extensive and excellent system of rapid transit which it has promised to give to Baltimore.

The World.

WEDNESDAY, *April* 26, 1893.

Judge Harlan, like the World, is brief but to the point. He wastes no words but says what he has to say quickly. He said his say in the Lake Roland case Tuesday, when he refused to sustain the demurrer of the city to the Lake Roland Company's application for an injunction. By so doing he practically says the injunction shall stand.

It is well that we have courts to stand against injustice, for if ever there was injustice it is in this assault upon the Lake Roland Company. For it is an assault and nothing else. The World has always been outspoken for what it believed to be right. It has been so in this Lake Roland case and proposes to be. It wants the city protected in all possible ways, but the mayor cannot bring forward one good and valid reason why this assault has been made upon the Lake Roland Company. The fact that two tracks upon Lexington St. would to a certain extent interfere with traffic, has nothing whatever to do with it. The only question that can properly enter into the discussion is "Has the city the power to withdraw from a contract made by the passage of an ordinance, which is accepted by the other party in good faith, and as a result of which has invested a large amount of money in building and equipping a street railway?" The court of appeals of this State says that the city has such power. Other courts and the constitution say it has not. Common sense teachss that the city cannot retreat from what it conceives to be a bad bargain, after the bargain is made.

City Solicitor Bryan, who gave the opinion in this case to the effect that the city had such power, declared directly opposite in the Bolton lot case, when he said that the city could not withdraw from the contract, or ordinance, which called for the sale of the lot to the Belt line, in such portion as applied to that part of the lot the Belt line needed for its business, but could withdraw from that portion which in nowise affected the value of the lot to the Belt Line Company. How Bryan and the mayor can reconcile these two opinions is a mystery. In one he says the city can retire from a contract no matter to what extent it injures the other party's business or plant, and in the other he says the city cannot withdraw because it would be violation of a contract and impair the rights of the company.

The mayor can show his good faith in this matter by having the Baltimore, Canton & Point Breeze franchise repealed. This paper railroad company has a grant for double tracks on the street. Why should this grant stand while the city is attempting to oust another company that has a *bona fide* existence, from the street?

Can the mayor answer this question?

The Morning Herald, published every day in the year by the Herald Publishing Company, Baltimore and Charles Sts. A. Bechhofer, general manager.

THURSDAY, *April* 6.

Has not the State of Maryland and city of Baltimore badgered and oppressed the Lake Roland railway corporation about long enough?

300 The Sun. Ten pages.

BALTIMORE, SATURDAY, *April* 15, 1893.

Lexington street.—What shall be said of the present condition and future prospects of Lexington street between Calvert and North? At present and for months past, it has been almost as completely closed, except for pedestrians, as if it had never been opened. It is certainly "no thoroughfare." It is one of the oldest streets in the city, has been recently extended eastwardly so as to connect with Douglas street, and made an east and west thoroughfare, at great expense to the city, and to property-owners. For the same purpose, it has been regraded and repaved from Calvert street to Charles, so as to reduce the steep ascent which interferred with its use as a "thoroughfare" for vehicles, an improvement, which involved the further expense of changing the grade of St. Paul street from Lexington to Fayette. The object of all this work and expenditure has been apparently frustrated by the action of a street railway company, to which the mayor and city council had improvidently granted privileges which were found likely to prove detrimental to the general public, and inconsistent with the realization of the object for which so much of the people's money has been spent.

To repair the error of the preceding council, the present council passed an ordinance restricting the railway company to a single track upon Lexington street from North to Charles, in the place of the double tracks which the company were busily engaged in laying under the authority originally granted. The company persisted in its claim to have two tracks as at first authorized, and denied the right of the council to revoke the permission previously granted. Pending the decision of the question in the appellate court, to which by arrangement the case had been carried, Lexington street, under the windows of the post office and the city hall, remained all winter in a condition worse than that of any country lane—unpaved, with rails projecting above the ground, so as to limit the space for vehicles to a narrow passage-way along the northern kerb.

The unanimous decision of the court of appeals being adverse to the company's claim and in favor of the city, the work of restoring the street to a safe and passable condition was begun, when it was again arrested by the determination of the company to renew the litigation by carrying the case if necessary into the Federal courts, by appealing from the highest court in Maryland to the Supreme Court of the United States. The blockade of the street is re-established. It remains in its torn-up and unsightly condition—"no

thoroughfare," simply an object lesson in the ways of street-railway companies and municipal modes of dealing with them.

The company's contention is that the ordinance granting the privilege of laying double tracks on Lexington street, without any express reservation of a right of repeal or modification on the part of the mayor and city council, constituted, when accepted by the company, an "irrevocable contract" between the company and the city, which no legislation on the part of the latter can impair, without a violation of the Constitution of the United States. This point was necessarily before the court of appeals when it recently decided in favor of the city's right to revoke the permission to have two tracks on Lexington street. The company's expectation or endeavor now, is either to induce the court of appeals to reverse its own decision, or be reversed by the Supreme Court of the United States, upon the ground that its recent decision was erroneous, rendered in ignorance of the law, or, at least, of decisions of the Supreme Court of the United States, with which it is supposed to be in conflict.

Without entering upon any discussion of the law of the case, or questioning the company's right to exhaust all legal remedies which, it may be advised, are open to it, one thing is obvious. The company can gain nothing and may lose everything by fighting the city. The public are interested, and will not consent willingly to be robbed of the free use of Lexington street as a thoroughfare while the company is carrying its legal point to the Supreme Court, to be decided, it may be, three or four years hence. Whatever question may be made about the city's right to revoke its grant as to the tracks on Lexington street, the company's charter is clearly subject to repeal by the legislature. The people of Maryland, in 1851, carefully guarded against any further abuse or extension of the doctrine of the "Dartmouth College case" in this State, by a constitutional provision, which has been retained in the constitution of 1867.

In the 5th paragraph of the 4th section of the very ordinance (No. 23 of April 8, 1891), under which the company claims a perpetual and irrevocable right to have its two tracks, it is expressly provided—that "it shall be lawful for the mayor and city council, at any time hereafter, to cause to be removed at the expense of the company, any or all of the poles and overhead wires hereby authorized to be erected," after one year's notice to the company to that effect. Of what use would the company's double tracks on Lexington street be to it, with its poles and wires taken away, and its elevated structure on North street made useless? It is further "declared to be the distinct purpose and intention" of the ordinance to give the city's consent to the use of the overhead electric system by the company "only upon its compliance with the terms and conditions" of the ordinance. Thus, it appears, that the "contract" in the case, has two sides to it, and that, if there is to be a fight, the city has the long end and the cold end of the porker. Perhaps it would be more sensible to raise the blockade of Lexington street, and accept the terms of the mayor and city council, without further kicking against the pricks.

301 The Baltimore News. Published by the Evening News Publishing Company of Baltimore city. Office, No. 201 East Baltimore street. "News" telephone numbers: Business office, 258; editorial room, 244.

SATURDAY EVENING, *April* 15, 1893.

While the bosses are about it, why not have the council pass an ordinance forfeiting the whole Lake Roland franchise, ordering all the tracks and poles torn up and expelling the officers, stockholders and directors from the State? Kick 'em out! How dare these insolent carpet-baggers come in here and spend their millions building rapid transit on streets which the bosses wish to pre-empt by franchises for "paper" roads! Let Lexington street be cleared immediately so that it may be turned over, as soon as public sentiment has subsided, to the franchise-broking concern, which has already gobbled Douglas street, and to which the council has voted the right for a ramshorn railroad ramifying all over East, North and West Baltimore!

The Baltimore News.

THURSDAY EVENING, *April* 27, 1893.

The people of Baltimore are just now none too well pleased with their public servants and they are in no temper to be fooled with. Mayor Latrobe has a chance to serve himself by serving the public. Let him refuse to grant permission to Mr. Bowie to plant trolley poles on Baltimore street. If there is an appeal to the city council let that body bear the responsibility of going counter to the public interest.

This is sound and disinterested advice to Mayor Latrobe. After his opposition to the Lake Roland Elevated railroad's attempts to put two tracks on Lexington street, where everybody directly interested wants them, he certainly cannot afford to put trolley poles and wires on Baltimore street where they are, distinctly and emphatically, not wanted.

Mayor Latrobe has an excellent chance to demonstrate that he has the public interest at heart. A really shrewd politician would hasten to avail himself of the opportunity.

302 *Affidavit of Edward H. Bouton.*

Filed April 29, 1893.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE TRUST & GUARANTEE COMPANY, Trustee,
vs.
MAYOR & CITY COUNCIL OF BALTIMORE *et al.*

I hereby certify that on this 29th day of April, in the year eighteen and ninety-three, before the subscriber, a commissioner of the

United States for the district of Maryland, personally appeared Edward H. Bouton and made oath in due form of law as follows:

That he is the secretary of the Lake Roland Elevated Railway Company, and that he was the secretary of the board of directors of said company, and of the meeting of the stockholders of said company at the meeting of said board of directors, and of said stockholders hereinafter referred to.

That at a meeting of the board of directors of the Lake Roland Elevated Railway Company, held at No. 229 North Charles street, on Wednesday, August 3, 1892, at 12 o'clock noon, there were present a majority of said board of directors, and the following proposition was laid before said meeting:

To the board of directors of the Lake Roland Elevated Railway Company:

BALTIMORE, MD.

GENTLEMEN: We hereby propose to build, equip, furnish and fully complete, ready for operation, all the work and materials included in the engineer's specifications, which are attached hereto, and embracing power-station building, car-house building, overhead line, engine plant, boiler plant, electrical equipment of station, car bodies, trucks, electric motors, track, road-bed and bridges and roofs, all in a thorough workmanlike manner, and in strict accordance with the letter and spirit of said specifications. We will assume all contracts which have heretofore been entered into by the railway company, for materials or labor provided for in said specifications.

303 We will accept in payment for the above work the one million dollars of first mortgage five (5) per cent. bonds, which are to be issued by the company, and one hundred thousand dollars in cash. Said bonds and cash are to be deliverable to us as the work proceeds and as may be agreed upon by the railway company's board of directors and ourselves.

Very respectfully,

(Signed) JARVIS & CONKLIN.

That the above proposition on motion was unanimously accepted by the said board of directors.

That at a meeting of the stockholders of the Lake Roland Elevated Railway Company, duly called in conformity with law, and held at the office of the company, No. 229 North Charles street in the city of Baltimore, on the sixth day of August, in the year eighteen hundred and ninety-two, there were present stockholders together owning or representing more than a majority of the shares of the capital stock of the said Lake Roland Elevated Railway Company.

That the secretary then presented to the meeting the above proposition from Jarvis & Conklin, which had been at the aforesaid meeting of the board of directors presented to said board and accepted by it, and on motion, the following resolution was unanimously adopted:

"Resolved, That the proposition from Messrs. Jarvis and Conklin, for the construction, building, and equipment of the road, which has been presented to this meeting, be accepted, and that the action of the board of directors had at the meeting of said board of directors, held August 3d, 1892, in relation to said proposition is hereby ratified and confirmed."

That in pursuance of the acceptance of the above-recited proposition by the directors and stockholders of the Lake Roland Elevated Railway Company, the entire issue of one thousand bonds of one thousand dollars ($1,000) each, have been delivered by James L. McLane, president of the said Lake Roland Elevated Railway Company, under a resolution of the said board of directors, to the said Jarvis and Conklin, or to persons designated by said Jarvis and Conklin to take said bonds.

304 That although said bonds were in the hands of the trustee, and, therefore, not physically in the possession of said Jarvis and Conklin, at the time of the passage of the repealing ordinance of November 18, 1892, it will appear from above resolutions and proceedings that the said Jarvis and Conklin, under the proposition above set forth, became entitled to all of said bonds, in consideration of the performance of their contract, on the 6th day of August, in the year eighteen hundred and ninety-two, when said proposition was finally accepted by the stockholders; that said mortgage is dated the first day of September, 1892, and that the said bonds also bear said date and the interest upon the same dates from said first day of September; that said mortgage was recorded long prior — the passage of said repealing order, and that at the time of the acceptance of said proposition, by which the said Jarvis and Conklin bound themselves to build said railway for said mortgage bonds, and one hundred thousand dollars in cash, there was no intimation whatever from any source that any objection would be made to two tracks on Lexington street, and that said proposition was made and accepted in good faith by said Jarvis and Conklin and the said Lake Roland Elevated Railway Company, with the expectation that the said railway company could reach its terminus at the corner of Lexington and Charles streets by double track, and that part of the security of said bonds was the right to maintain and operate double tracks on Lexington street.

That the said mortgage bonds are now in the hands of a syndicate of bondholders, represented by the Jarvis and Conklin Mortgage Trust Company, a corporation of the State of Missouri, of which syndicate the said Jarvis and Conklin are themselves members, and which syndicate advanced the money on the faith of said contract, and of the said bonds for the construction of said road by the said Jarvis and Conklin.

That the repealing ordinance of November 18th, 1892, has taken away part of the security of said bonds, and has lessened the value of said bonds in the hands of said syndicate.

That the said Jarvis and Conklin, after the acceptance of their proposition as above set forth, proceeded immediately and with

great diligence to fulfill their contract, and between the time
305 of the acceptance of said proposition and the passage of said repealing ordinance the said Jarvis and Conklin expended great sums of money on the construction of said railway and bound themselves by contract with the Pennsylvania Steel Company, and other persons and corporations for the immediate completion of the entire railway system, and that they have faithfully fulfilled all the terms of their said proposition.

That all of said mortgage bonds were executed by the president of the Lake Roland Elevated Railway Company, sealed with its seal and attested by the signature of this affiant, and certified to by the Baltimore Trust and Guarantee Company, trustee, long before the passage of said repealing ordinance of November 18th, 1892.

EDWARD H. BOUTON.

Subscribed & sworn to before me this 29th day of April, A. D. 1893.

ISAAC BROOKS, JR.,
United States Commissioner in & for the District of Maryland.

306 *Defendant's Motion not to Receive Certain Affidavits Filed by Plaintiff.*

Filed May 4, 1893.

In the Circuit Court of the United States for the District of Maryland.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

The Mayor and City Council of Baltimore files this its motion not to receive the affidavits filed by the plaintiff on the 29th April, 1893, relating to the wishes and opinions of residents along the line of Lexington street as to the desirableness of two railway tracks on said street, and also the clippings from newspapers filed on said date and the affidavit of James L. McLane, president of the Lake Roland elevated road, because said affidavits are not properly in rebuttal, but relate to matters inferred in the bill and concerning which affidavits were filed with the bill, or before 27 April, 1893, the time allowed in the order of court for plaintiff to file its affidavits.

THOMAS G. HAYES,
Solicitor for Defendant.

307 *Defendant's Exception to Affidavits Filed by Plaintiff.*

Filed May 4, 1893.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

The Mayor and City Council of Baltimore files this its exception to all the affidavits filed by the plaintiff in this action, as well as to each of those so filed on and before the 21st April, 1893, and to each of those filed on or before the 29th April, 1893, as well as to all of said affidavits so filed, the purpose of this exception being to include and except to said affidavits separately, as well as to except to said affidavits taken in their entirety, and assigns the following reasons for its exception:

1. Said affidavits have no relevancy to the issues in this cause.
2. Some of said affidavits were filed after the time allowed the plaintiff to file the same by order of court.

THOMAS G. HAYES, *For Def't.*

308 *Petition of Defendant for Leave to File Certain Exhibits.*

Filed May 4, 1893.

In the Circuit Court of the United States for the District of Maryland.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

The mayor and city council of Baltimore prays leave of court to file editorials of Balto. Sun, certified as such, marked "Exhibit A," and the annexed affidavits, marked Exhibit "B."

And as in duty, &c.

THOMAS G. HAYES,
Solicitor for D'f't.

On the aforegoing petition leave is granted as prayed.

309 ADDITIONAL EXHIBITS AND AFFIDAVITS FILED BY DEFENDANT.

DEFENDANT'S EXHIBIT "A."

Filed May 4, 1893.

BALTIMORE, FRIDAY, *March* 17, 1893.

The rights of the city sustained.—The decision of the Maryland court of appeals in the case of The Lake Roland Elevated Railway Company *vs.* The Mayor and City Council of Baltimore and Alfred E. Smyrk, City Commissioner, while for the most part merely the declaration of well-established legal principles, has just now an especial value and importance owing to the peculiar local conditions which have arisen in the development of street-railway enterprises in this city. The question at issue in this case was the legal right of the city to revoke the privilege which it had granted to the company of laying double tracks on East Lexington street between North and Charles. The city claimed that the ordinance which authorized the laying of two tracks on Lexington street only granted a license, and not a charter right or franchise, and that this license was therefore revocable. It maintained, moreover, that it was invested with full power and control over its streets, especially in the matter of laying railway tracks, and that in the exercise of its police power it had authority to prohibit the double tracks on Lexington street as hostile to public safety and convenience. The company contended that the ordinance empowering it to lay double tracks created an irrepealable contract which gave it a vested right in the use of East Lexington street between the points mentioned. The court of appeals in sustaining the city's right to limit the company to single tracks between North and Charles streets upholds in the strongest manner the principal of municipal control over its streets and highways. It is not, in fact, merely a power, but a duty of which it cannot get rid. The control of the city over the streets, says the court, "is attended with the duty of preserving them for their legitimate purposes. They are intended for the passage of the people over them, on foot, or horseback and in vehicles, in their various occasions of business, convenience and pleasure. It is not competent for the city to defeat the primary purpose for which they were dedicated to the public use. They are highways and must be maintained as highways so long as they are kept in existence. The power over the streets is held on the same trusts as the other legislative powers conferred on the mayor and city council. It is intended to be used for the purpose of preserving them in the character of streets in such condition as may be most suitable for the public use." If an ordinance cannot be repealed which would seriously impair, if not virtually destroy, such use, then, says the court of appeals, "the city council has lost all control over the streets and has renounced its legislative power."

Although the court took occasion to say, with some emphasis, in answer to comment upon the supposed unfavorable effect on the interests of other railway companies of a decision in favor of the city, that it was only dealing with the case before it, and that it would protect vested rights by all the powers at its command, the general principles which it announces may be found applicable to other streets of the city besides Lexington and to other railway companies besides the Lake Roland corporation. There can be no desire in any quarter to interfere with vested rights, corporate or individual, which were lawfully vested and which do not interfere with public rights, nor any disposition to obstruct or impede enterprises which are meritorious in themselves and which will add to the general comfort and convenience. The people of Baltimore have borne so cheerfully what would have been condemned in other cities as intolerable nuisances and encroachments that they cannot be accused of lack of patience in their dealings with corporations. But they had begun to feel of late that under certain conditions patience might cease to be a virtue, and that it was important to have clearly established the rights which belonged to them and those which may properly be claimed by the various corporations to which street privileges have been conceded. The decision of the court of appeals in the Lake Roland railway case, therefore will be hailed with satisfaction as a timely and authoritative declaration which sweeps away the fogs and mists that somehow seem to have obscured the view even in official circles and takes us back to first principles. These first principles, which would appear to have been forgotten in some quarters, as they are denied in others, are that the streets are primarily intended for public highways, and that they must be maintained for that purpose, and that any use inconsistent with that purpose can be prohibited and prevented by virtue of the police power with which the city is clothed. In the face of this decision there can be no room for further doubt, either as to the general duty or authority of the city with regard to its streets. It not only has the power, says the court of appeals, to protect the public in its right to their safe and convenient use, but it is a trustee clothed with a solemn duty in the premises which it not only cannot carelessly ignore, but of which it cannot deliberately divest itself. No little credit for the result which has been accomplished is due to City Counsellor Hayes, whose brief in the case was exceptionally able and exhaustive.

Endorsed: Editorial "Balto. Sun," March 17, 1893. "Exhibit A."

310 DEFENDANT'S "EXHIBIT B."

Filed May 4, 1893.

We, the undersigned, hereby certify that, in our opinion, the construction and maintaining of two railway tracks on Lexington street, between Charles street and North street, would be an incon-

venience to the public, by interfering with the facilities for travelling thereon and detrimental to the property bounded thereupon:

J. ALEX. PRESTON.
ROBERT LUDLOW PRESTON, 114 E. Lexington St.
ALEXANDER PRESTON.
J. W. BRYANT.
A. MILHOLLAND, 112 Lexington St.
FREDERICK LEIST, 108 E. Lexington St.
PERCY C. HENNIGHAUSEN, 108 E. Lexington St.
L. P. HENNIGHAUSEN, 102 E. Lexington street.
FRANK GOSNELL.
J. DENMEAD.
JACOB H. MITNICK.
EMIL BUDNITZ.
C. D. McFARLAND.
JAMES W. BOWERS, JR.
RICH'D M. DUVALL.
MAURICE GREGG.
G. BEATTY GRAFF.
OSCAR WOLFF.
GEO. T. R. LEWIS.

311 On this the 4th day of May, 1893, before me, the subscriber, the clerk of the circuit court of the United States for the district of Maryland, appeared James P. Gorter, and made oath that the parties who signed their names to the certificate herewith attached signed in his presence.

JAMES P. GORTER.

JAS. W. CHEW,
Clerk Circuit Court U. S.

312 *Affidavit of Joseph W. Whiteford.*

Filed May 4, 1893.

In the Circuit Court of Baltimore City.

THE BALTIMORE TRUST AND GUARANTEE COMPANY
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

On this the 4th day of May, 1893, before the subscriber, the clerk of the circuit court of the United States for the district of Maryland, before me personally appeared Joseph W. Whiteford and made oath on the Holy Evangely of Almighty God that he is informed and therefore charges that Jarvis and Conklin, the parties named and referred to in the affidavit of Mr. Bouton, secretary of the plaintiff, were at the time and before the passage of the ordinance No. 1, approved November 18th, 1892, large stockholders in the Lake Roland Elevated Railway Company, and that none of the bonds left in the

possession of the plaintiff or were demanded by the Lake Roland Company until after the 18 November, 1892.

JOS. W. WHITEFORD.

Sworn and subscribed to before me—
JAS. W. CHEW,
Clerk of the Circuit Court U. S., Dist. of Md.

313 *Agreement as to Hearing.*

Filed May 4, 1893.

In the Circuit Court of United States for the District of Maryland.
In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
MAYOR AND CITY COUNCIL OF BALTIMORE.

In the above-entitled cause it is, this 4th day of May, 1893, stipulated and agreed between the parties thereto as follows:

I. That the said cause and the hearing thereof under the order of court passed on the original bill shall be taken as now standing on final hearing on bill, answer, proof, and exhibits, and the court shall pass a final decree on the whole case as presented on the pleadings, proof, and exhibits, and the law applicable to a final hearing on bill, answer, proof, and exhibits shall apply to said hearing, from which final decree either party shall have the right to appeal as provided by law.

II. That all the affidavits filed in the above-entitled cause are to have the same effect as though the respective parties making said affidavit had been heard to make the same under an order to take testimony with the right of either party to cross-examine said witnesses, but subject to all legal exceptions in regard to the relevancy of the same and subject to such objections as may be made as to the time of filing said affidavit.

314 III. The following agreements and exhibits are to be used at the hearing and to have the same legal effect as though properly certified copies of the same had been filed with the bill of complaint:

(1.) The mortgage to the Baltimore Trust & Guarantee Company (Plaintiff's Exhibit #1).

(2.) The repealing ordinance of November 18th, 1892 (Plaintiff's Exhibit #2).

(3.) The certificate of incorporation of the North Avenue Railway Company, found on page 11 of Defendant's Exhibit #2.

(4.) The agreement of consolidation forming the Lake Roland Company, found on pages 12 to 19 of Defendant's Exhibit #2.

That all of the testimony and exhibits contained in Defendant's Exhibit #2 may be read in evidence in the same manner, and have

same legal effect as though the same had been taken in this court in this cause on an order to take testimony for final hearing.

STEELE, SEMMES & CAREY,
Solicitors for Plaintiff.
THOMAS G. HAYES,
W. S. BRYAN, JR., *Sol-. for Def'd't.*

315 *Opinion.*

Filed November 13, 1894.

In the Circuit Court of the United States in and for the District of Maryland, at Baltimore.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE. } In Equity.

Steele, Semmes & Carey, solicitors for plaintiff.
Thomas G. Hayes, Wm. S. Bryan, Jr., solicitors for defendant.
Argued and submitted to Goff, circuit judge, and Morris, district judge.

GOFF, *Circuit Judge:*

The bill in this case was filed by "The Baltimore Trust and Guarantee Company" against "The Mayor and City Council of Baltimore." The plaintiff is a corporation organized under the laws of the State of Maryland, and defendant is the public municipal corporation of Baltimore city, in that State. On the first day of September, 1892, the Lake Roland Elevated Railway Company
316 executed a certain indenture, in which the plaintiff is trustee, for the purpose of securing the payment of the principal and interest of one thousand first-mortgage coupon bonds, of the denomination of one thousand dollars each, payable in the gold coin of the United States of America, the principal being due on the first day of September, 1942. By this deed the Lake Roland Elevated Railway Company granted and conveyed to "The Baltimore Trust and Guarantee Company" and to its successor in the trust thereby created all the railway and railway tracks owned, used, occupied, and enjoyed by said company, including the line of railway authorized to be constructed by the North Avenue Railway Company of Baltimore City, by virtue of ordinance No. 23, approved April 8th, 1891, of the ordinances of the mayor and city council of Baltimore, which authorized the construction of double tracks on Lexington street, in Baltimore, from the corner of Charles and Lexington streets, the city terminus of the railway system of the Lake Roland Elevated Railway Company, eastwardly along Lexington street to where it corners with North street. On the third day of August, 1892, the Board of directors of the Lake Roland Elevated Railway Com-

pany contracted for the construction of that road, agreeing to pay therefor the said one thousand bonds, aggregating one million dollars, and one hundred thousand dollars in cash, which action of the board of directors was subsequently, at a meeting of the stockholders of that company, held August 6, 1892, duly ratified. In ac-
317 cordance with this contract and the order of the railway company, the mortgage was duly executed, dated September 1, 1892, the bonds also bearing that date.

After the execution and recordation of the mortgage, all of said bonds were duly executed, certified by the Baltimore Trust and Guarantee Company as trustee, left with the trustee (for purposes connected with said indenture and the building of the road), and afterwards, on the order of the board of directors thereof, delivered to the contractors then engaged in constructing the line. After the work had commenced, when a considerable portion of the road had been finished and after large expenditures had been made for labor and material for the uncompleted part, on which work was then being prosecuted, and after the bonds had been, as before mentioned, delivered, the defendant, on November 18, 1892, by ordinance No. 1 of that date, repealed so much of the ordinance of April 8, 1891, No. 23, as authorized the placing of double tracks upon Lexington street, between North and Charles streets. The plaintiff claims that the effect of this repealing ordinance has been to take away part of the security of the bonds so placed in its custody as trustee, causing the value of the same to materially decrease, and therefore the plaintiff, "in the interest, for the protection, and at the request of all the bondholders, for the purpose of protecting them from an irreparable injury, files this bill." The Lake Roland Elevated Railway Company was formed and duly organized under the laws of the State of Maryland by an agreement of consolidation between "the North Avenue Railway Company of Baltimore City" and
318 "the Baltimore, Hampden and Lake Roland Railway Company," which said two companies were corporations created under the laws of that State, the former under the general corporation laws and the latter by an act of the General Assembly.

By an act of 1890, chapter 217, of the General Assembly of Maryland, the charter of the North Avenue Railway Company of Baltimore City was amended by authorizing it to lease, purchase, or aid other roads. In the general railway act, under which that company was incorporated, it was provided "that no railroad company shall be allowed to pass through the city of Baltimore without the consent of the municipal authorities," and therefore the said North Avenue Company made application to the mayor and city council of Baltimore for consent to the use of certain streets of that city, including the right to lay and maintain double railway tracks on Lexington street, from North street to Charles street, so that it might thereby reach its proposed terminus at the corner of Charles and Lexington streets. An ordinance was offered in the council on the 17th day of November, 1890, properly referred, considered, and reported, and on April 8, 1891, passed and approved, now known as ordinance No. 23. By it the North Avenue Railway Company was authorized "to lay

down and construct double iron railway tracks for the purposes of its business" on a number of the streets of Baltimore, including that portion of Lexington before mentioned. This right so granted was upon certain conditions expressly set forth in the ordinance, to the performance of which the North Avenue Railway Company
319 bound itself by accepting the ordinance, and which was assumed by the Lake Roland Elevated Railway Company by virtue of the agreement of consolidation under which it succeeded to all of the corporate rights of the North Avenue Railway Company. The following are among the terms and conditions set forth in said ordinance: That the North Avenue Company shall permit other railway companies to use its tracks upon certain conditions; that it shall carry over its lines, free of charge, passengers who present transfer tickets from any other city passenger railway company connecting with it; that it shall at all times keep the space between its tracks and two feet on each side thereof in good repair, and whenever any portion of any street upon which its tracks shall be laid shall be repaved the company shall pay the entire expense of repaving such space with such pavement as the mayor and city council shall prescribe; that the company shall permit all electric-light, telephone, telegraph, or other wires on North street to be strung on its elevated structure; that the company shall be liable for the payment of the park tax and be subject to all the general regulations then existing or thereafter to be made relative to city passenger railways not inconsistent with said ordinance; that the mayor and city council of Baltimore shall have the privilege within two years after the expiration of fifteen years from the passage of said ordinance to purchase the stock and interest of said company, with such appurtenances to the same as the mayor and city council might deem proper.

320 Before the Lake Roland Company began the erection of its elevated railway on North street it was necessary for it to obtain from the General Assembly of Maryland a ratification of ordinance No. 23, which was done by chapter 112, acts of 1892, in the following words: "Be it enacted by the General Assembly of Maryland, section 1, that ordinance No. 23 of the mayor and city council of Baltimore, approved April 8, 1891, be, and the same is hereby, ratified and confirmed; this ratification to have the same effect as if the mayor and city council of Baltimore at the time of the passage of said ordinance had been fully authorized by the General Assembly to pass said ordinance and to grant each and all of the powers and privileges therein contained; the said mayor and city council to have the same power and control hereafter in reference to the enforcement, amendment, or repeal of said ordinance as it has or would have in respect to any ordinance passed under its general powers." This act certainly removes all doubt as to the power of the city authorities to pass ordinance No. 23, and if the right did not exist before this action of the legislature cures the defect and makes the grant of the mayor and city council valid, subject to their right to enforce, amend, or repeal possessed by them under their general powers.

The plaintiff insists that ordinance No. 23, by which the North Avenue Company was authorized to lay and maintain double
321 tracks on Lexington street, it having been accepted and large expenditures of money made thereunder, constitutes an inviolable contract between the municipal corporation and the company, the terms of which cannot be altered or impaired without the consent of both parties thereto, and that consequently the repealing ordinance of November 18, 1892, is in contravention of the tenth section of the first article of the Constitution of the United States; that part thereof which forbids a State from passing a law impairing the obligation of contracts, and is therefore void. The defendant claims that no Federal question is involved in this controversy, and that this court is without jurisdiction of the case. I am clearly of the opinion, for reasons that will be stated fully as I proceed with its consideration, that this court has jurisdiction of this case, and consequently the demurrer of defendant to the bill will be overruled.

I now come to the consideration of ordinance No. 23. Did its enactment and acceptance constitute a contract of the character claimed by the plaintiff; and, if so, has such contract been impaired by the repealing ordinance of November 18, 1892? These questions are to be answered as the law is found to be applicable to the facts I have stated. The defendant insists that ordinance No. 23 was a mere license to the railroad company to use the streets designated in it for railroad purposes, subject to modification or repeal at the will of the municipal authorities of the city of Baltimore; also that the court of appeals of the State of Maryland prior
322 to the passage of said ordinance had decided that the mayor and city council of the city of Baltimore could not pass an irrepealable ordinance, which decision, it is claimed, under the rules of construction relating to such matters, became part of the city's agreement with the railroad company. In support of this contention the cases of Rittenhouse *v.* Mayor, &c., 25 Md., 337, and State *v.* Graves, 19 Md., 351, are cited. I have examined them carefully, considering the facts in each in connection with the opinions of the court relating thereto, and I am convinced that it was not the intention of the court of appeals to hold as the defendant here claims, but that it really designed to and did announce the now well-established doctrine that municipal corporations, so far as their own internal affairs are concerned—such as opening, closing, and grading streets or constructing buildings for public use in a particular manner or at a certain place—can pass no irrepealable ordinance. The court in those cases did not regard the ordinances as contracts, but considered them municipal enactments or regulations repealable at the pleasure of the city, as the public interest might demand.

It may be admitted that, as the general railway act of the State of Maryland was passed after the adoption by the people of that State of the constitution of 1867, the right is reserved to the General Assembly to repeal, alter, or amend the charters of the North Avenue Railway Company and of the Lake Roland Elevated Railway

Company, and also it may be conceded that if the General
323 Assembly of Maryland had repealed the ordinance relative to double tracks upon Lexington street or authorized the mayor and city council of Baltimore to do so, then there would be no impairment of the obligation of the contract relied on in this case, and that the plaintiff would not be entitled to the relief sought. It is certainly true that the General Assembly has not directly legislated relative to the modification or the repeal of said ordinance No. 23. The question next to be answered is: Has the mayor and city council, under the authority of the General Assembly, done so? That the municipal authorities of the city of Baltimore, in passing the repealing ordinance, acted under supposed legislative authority and not in the exercise of a right under their general powers to repeal a mere license or rule of regulation is, I think, clear. That they have not the right, under their general powers, to repeal an ordinance passed by them by which a contract has been created is also clear, and as their only legislative grant of powers to repeal limits such action, so far as ordinance No. 23 is concerned, to their general powers, it is quite evident that the authority under which they acted in passing ordinance No. 1 was supposed and not real. I cannot agree with counsel for defendant that authority can be found in chapter 370, Acts 1890, and in chapter 112, Acts 1892, General Assembly of the State of Maryland, giving the mayor and city council of Baltimore the power to amend or repeal ordinance No. 23, but after hearing their arguments and reading the opinion of the city solicitor
324 relative to their power under said legislation, a copy of which is found in the record of this cause, I can readily understand why the municipal authorities of that city supposed that they had power from the General Assembly to pursue the course they did. It is true that by the acts of 1890, chapter 370, it is provided that the mayor and city council of Baltimore shall have power to regulate the use of the streets, lanes, and alleys in that city by railway or other tracks, gas or other pipes, telegraph, telephone, electric-light or other wires and poles in, under, over, or upon the same, but except in regard to underground conduits for wires, for which purpose it seems to have been enacted, I do not find that it gives any additional authority to said officials, so far as the use of the streets of Baltimore and the regulation of the same *is* concerned. It has been conceded for years, long recognized as the law, that the mayor and city council of Baltimore have full control over the streets and highways of that city, and the act of 1890 has been held to be "an amplification of their general power over and right and duty to regulate and maintain the streets and highways of the city for the use of the public." The general railway act of 1876 gave the municipal corporation of Baltimore the general power to consent or to refuse assent to the use of its streets by railroad tracks, and independent of this it has been held for years that such municipalities have that general power without the direct authority of the legislature, so far as local or street railways are con-
325 cerned. Dillon's Municipal Corporations, 4 Ed. Sec., 724;

Hinchman *v.* Patterson Horse R. Co., 2 C. E. Green, 75; Jersey City & Bergen R. Co. *v.* Hoboken R. Co., 20 N. J. Eq., 69; Atchison St. R'y *v.* Missouri Pac. R. Co., 31 Kans., 660; Brown *v.* Duplessis, 14 La. Ann., 842; State *v.* Corrigan Consolidated Street Railway Co., 85 Md., 263, 55 Amer. Rep., 361.

The rule of construction with respect to legislative grants to corporations relied on by the defendant may be conceded: "That only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." Minturn *v.* Larue *et al.*, 23 How., 435; Barnett *v.* Denison, 145, U. S., 135; Hamilton Gas Light and Coke Company *v.* Hamilton City, 146 U. S., 258; Fertilizing Co. *v.* Hyde Park, 97 U. S., 659.

Did chapter 112, acts 1892, to which I have already alluded and to which, in connection with the rules and authorities just cited, I will again refer, justify the repeal of ordinance No. 23? So far as it relates to the right to repeal does it give to the defendant any power additional to that possessed by the city authorities before its passage? It seems to me that it does not, so plainly so that it is rather strange it should be seriously contended to the con-
326 trary. What right to amend, alter, or repeal did the city possess under its "general powers" prior to the date of said enactment? In this case it had just such right and no more, as it reserved in ordinance No. 23. The General Assembly, by said chapter 112, did not intend to reserve to the city authorities any additional or absolute right of amendment or repeal, but is careful to limit them to the "same power and control" as they would have under their "general powers." If an ordinance passed by them does not constitute a contract, but simply relates to affairs as to which the city alone is interested, then, under their general powers, their right to amend or repeal it is without limit. If a contract has been created by the ordinance, then the right to amend or repeal is such only as was reserved to the city in the enactment itself. The only clause in ordinance No. 23 providing for changes in or amendments to it is in the following words: "And shall be subject to all the general regulations now existing or hereafter to be made relating to city passenger railways not inconsistent with this ordinance." I do not find the right to appeal in this reservation, but simply the right to regulate, provided that the regulations proposed are not inconsistent with the terms of the ordinance. The right to regulate will not be held to mean the right to repeal or materially modify, or in effect to prohibit the exercise of privileges previously granted by the State and city, nor to impair the obligation of a contract or destroy vested rights.

327 I think that municipal corporations vested with full power to control and regulate the use of their streets do not exceed their powers in making irrepealable contracts, not exclusive in character, for the use of said streets for purposes relating to the public comfort and convenience, and also, that a legislative grant

made either directly by the legislature or indirectly through a municipal corporation duly authorized so to act constitutes a contract between the parties thereto, the terms of which cannot be altered without their mutual consent, except so far as the right to alter, amend, or repeal is expressly reserved in the grant itself or existed in constitutional or legislative provisions at the time of its passage.

Were this not so there would be but little security for investments made on the faith of such grants and no inducement to those controlling capital to make improvements absolutely necessary for the health and happiness of the people and for the progress and prosperity of the country. Justice requires that such legislative enactments, when the grantees thereof have accepted the same and acted thereunder, should become absolute and irrevocable contracts, which neither party thereto will be permitted to revoke nor allowed to disregard or add conditions thereunto more onerous than those first imposed.

I find from the decisions involving the questions I have been considering that where rights and privileges have been lawfully granted to and accepted by either a private or public corporation and valuable improvements have been made on the faith of such
328 grant, a contract has been thereby entered into, the impairment of which by a law of the State making such grant, passed by the legislature thereof or by a municipality authorized by it or acting under the authority of a statute supposed to give the power, the right so to do not having been reserved, is forbidden by section ten of article one of the Constitution of the United States. Trustees of Dartmouth College *v.* Woodward, 4 Wheat., 518; Chicago *v.* Sheldon, 9 Wall., 50; Shields *v.* Ohio, 95 U. S., 319; New Jersey *v.* Yard, 95 U. S., 104; Railroad Co. *v.* Richmond, 96 U. S., 521; Wright *v.* Nagle, 101 U. S., 791; Greenwood *v.* Freight Co., 105 U. S., 13; New Orleans, Spanish Fort and Lake Railroad Co. *v.* Delamore, &c., 114 U. S., 501; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S., 650; New Orleans Water Works Co. *v.* Rivers, 115 U. S., 674; Sioux City Street Railway Co. *v.* Sioux City, 138 U. S., 98; St. Louis *v.* Western Union Telegraph Co., 148 U. S., 92; Saginaw Gas Light Co. *v.* City of Saginaw, &c., 28 Fed. Rep., 529; Coast Line Railroad Co. *v.* Mayor and Aldermen of the City of Savannah, 30 Fed. Rep., 646; Citizens' Street Railway Co. *v.* City of Memphis *et al.*, 53 Fed. Rep., 715; State *v.* Corrigan Consolidated Street Railway Co., 85 Md., 263; The City of Burlington *v.* The Burlington Street Railway Co., 49 Iowa, 144; 31 Amer. Rep'ts, 145.

I do not think it necessary—having reached the conclusions indicated—to consider other questions referred to in the pleadings and argument of this case, among them those of *res adjudicata*,
329 of acquiescence, and of the police power of municipalities. I will simply add that, as the plaintiff in this case was not a party to the case in the State courts between the Lake Roland Elevated Railway Company and the mayor and city council of Baltimore, it is not bound by the judgment rendered therein; that even if the railroad company did acquiesce in the repeal of ordinance No. 23, which is not at all apparent, that this plaintiff would not be

concluded thereby, and that, as I hold ordinance No. 23 to be a contract of the character described, it will be profitless to now consider the police powers of the municipal authorities of the city of Baltimore.

In declaring this result I am constrained to dissent entirely from the opinions delivered by the court of appeals of Maryland in the case of Lake Roland Elevated Railway Company *vs.* The Mayor and City Council of Baltimore and Alfred E. Smyrk, City Commissioner (77 Md., 352), construing the legislation of the General Assembly of that State and the ordinances of the mayor and city council of Baltimore relating to this controversy. The judgment of that deservedly distinguished tribunal, announced after careful consideration and reaffirmed after additional deliberation, caused me, as I examined this case, to doubt the correctness of the conclusion I found myself reaching and forced me again to reflect on the facts and study the authorities pertinent thereto. A careful re-examination of this case led me to conclude that my brothers had compelled me, in the discharge of my judicial duty, to differ
330 with them.

In construing the statutes of a State we follow, as a rule, the interpretation placed thereon by its court of last resort, but when connected therewith is involved also the construction of the Federal Constitution and the security of the interests protected by it we feel impelled to rely upon the decisions of the Supreme Court of the United States. We may add that should we under such circumstances be without the guidance of that court we would in that emergency beg to be permitted to think and act for ourselves, indulging the hope that our conclusion would accord with the decision of the State tribunal; and we would be unworthy of the respect of those with whom we differ and deserving of the contempt of all who agree with us should we under such circumstances decline to enter such decree as in our judgment the true interpretation of the Federal Constitution requires us to announce.

A decree will be passed, as indicated in this opinion, in substance as prayed for in plaintiff's bill.

NATHAN GOFF,
U. S. Circuit Judge.

331 *Dissenting Opinion of District Judge Morris.*

Filed November 13, 1894.

In the Circuit Court of the United States for the District of Maryland.
In Equity.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee,
vs.
THE MAYOR AND CITY COUNCIL OF BALTIMORE.

Dissenting opinion of Judge Morris.

MORRIS, *District Judge:*

I am unable to concur in the opinion of the circuit judge.

The powers of the city of Baltimore to pass ordinances with respect to its public highways are only such as the legislature has given to it. It has been given power to pass ordinances promoting the interests and insuring the good government of the city; to open, grade, and pave its public highways; and by the act of 1890, ch. 370, it was given the power "to regulate the use of the streets, lanes, and alleys in said city by railway or other track, gas or other pipes, telegraph, telephone, electric light, or other wires or poles."

332 And also it has such further powers as have been given to the city in respect to railroads on its streets by the general railroad law, so far as that law is applicable to city passenger railways. That law, Code, article 23, sec. 169, originally passed in 1876, ch. 242, provides that in locating any railroad to occupy any street it shall be competent for the municipal authorities to agree with the railroad company upon the manner, terms, and conditions upon which the street may be used or occupied; and further provides that no railroad company shall be allowed to pass through the city of Baltimore without the consent of the municipal authorities.

Possessing the powers just enumerated, the city passed the ordinance No. 23, known as the "North Avenue ordinance," approved April 8, 1891. It contains the authority under which the Lake Roland Elevated Railway Company, as the successor of the North Avenue Railway Company, has constructed its electric road in Baltimore city. It is an elaborate ordinance, containing many provisions and conditions. It authorized a double iron railway upon the streets mentioned in it, including Lexington street between North and Charles streets. It directs that the tracks shall be laid under the supervision and direction of the city commissioner, and has other provisions regulating the laying of the tracks. It provided, among other things, that if any final judgment for damages done to property by the construction of the elevated portion of the road was not paid in 60 days the owner should have the right to

enjoin the operation of the railway; also that within two
333 years after any successive period of fifteen years from the passage of the ordinance the city should have the right to buy out the railroad company at a fair valuation.

These and other provisions seemed to indicate that the city in passing this ordinance could not have been legislating in the exercise of a power derived from its general powers to regulate the use of its streets, but must have been "agreeing" with the railroad company, as empowered by the general railroad law, as to the terms, manner, and conditions upon which the railroad company might use the streets designated and as to the terms upon which it would consent to such use.

This ordinance was before the court of appeals of Maryland in Koch *vs.* North Avenue Railway Co. (75 Md., 222), and was treated by that court as one which the city could validly pass, except as to the elevated structure to be constructed on about three-quarters of a mile of its line. As to this, the court of appeals held (January 28, 1892) that it came within the prohibition of the general railway law of the State (Code, art. 23, sec. 186), which provided that no elevated railroad should be constructed except under a special charter of the General Assembly. Thereupon, for the purpose of curing this difficulty, the legislature was applied to and passed the act approved March 17, 1892, ch. 112. This act recites that by the city ordinance No. 23 the North Avenue Railway Company was duly authorized and empowered to construct, maintain, and operate an electric railway with the rights and privileges and subject to the terms and conditions in said ordinance set forth, with
334 the right to elevate its tracks on North street, "but before the railway company can elevate its tracks on North street it is required by law that the sanction of the General Assembly of Maryland should be given to said ordinance so far as it relates to the elevation of its tracks;" and thereupon it enacts that the ordinance is ratified and confirmed, "this ratification to have the same effect as if the mayor and city council of Baltimore, at the time of the passage of said ordinance, had been fully authorized by the General Assembly to pass said ordinance and to grant each and all of the powers therein contained, the said mayor and city council to have the same power and control hereafter in reference to the enforcement, amendment, or repeal of said ordinance as it has or would have in respect to any ordinance passed under its general powers."

The Lake Roland Company, as successor to the rights of the North Avenue Company, proceeded to construct the road under the terms of this ordinance, but before the railroad was completed and before it was operated the city council passed ordinance No. 1, approved November 18, 1892. It recites that by ordinance 23 the railroad company had been authorized and licensed to lay double iron railway tracks on Lexington street between North and Charles streets; and "whereas it appears to the mayor and city council of Baltimore that the public safety and convenience and the proper regulation of the use of the streets requires that there shall not be

more than one iron railway track laid down, constructed, or
335 maintained on said portion of Lexington street," and with a further recital that notice had been given by the city officials to the railroad company before the tracks were laid that they would be detrimental to the public interest, and that the mayor would, as soon as the city council met, recommend the revoking of the authority to lay such double tracks on Lexington street, it proceeds to enact that the ordinance, so far as it authorizes the laying of double tracks on Lexington street, be repealed and authorizes the maintaining and use of one track only.

It is this repeal, enacted, as the city claims, by virtue of its powers derived from the State legislature, which the complainant contends is an impairment of an existing contract between the city and the Lake Roland Elevated Company within the prohibition of the Federal Constitution.

The act of 1892, ch. 112, as I understand it, goes to the extent of a recognition by the legislature (as had before been held by the court of appeals of Maryland) that ordinance 23, except as to the elevated structure, was, when it was passed, a valid exercise of general powers which were vested in the city, and the act provided that, so far as any ordinance passed under those general powers was subject to amendment or repeal by the city, this ordinance should remain so. This proviso, if it has any effective force, must, it seems to me, have reference to some supposed power of the city in its governmental capacity for the public welfare to require the railroad to be constructed or operated or restricted in some
336 manner different from the precise manner set out in the ordinance, some change of speed differing from that provided in the ordinance, some change with respect to its overhead electric wires, or some change in the location of the tracks on the streets. If it had no reference to some such alteration or modification of the terms of the ordinance the insertion and enactment of the proviso would seem to have been idle and nugatory.

It may be conceded that under the general railroad law the city had the power to "agree" with the railroad company as to the use of the streets, and under that power to make the agreements embodied in ordinance 23, but, in my judgment, that agreement was necessarily made subject to the rule that, except by express authority from the legislature, the city, being but a trustee of the public highways for the benefit of the public, could pass no irrevocable ordinance depriving itself of its power to regulate the use of the streets so as to prevent danger to the public. As soon as it becomes apparent that a privilege of using the streets has been granted by it which works danger to the public it becomes the duty of the city to so regulate or modify the privilege as to protect the public, especially if this can be done without destroying the essential substance of the privilege.

Parties entering into contractual relations with a municipal corporation in its municipal character do so with notice that it cannot contract away its own governmental functions and duties which are

to be exercised from time to time for the benefit of the public, as occasion requires.

337 This doctrine had been repeatedly enforced by the court of appeals of Maryland with regard to the city of Baltimore and is the law of the State.

State *vs.* Graves, collector of Baltimore, 19 Md., 351.
Rittenhouse *vs.* Mayor, etc., of Baltimore, 25 Md., 337.
Geozler *vs.* Georgetown, 6 Wheaton, 593.
Illinois Central R. Co. *vs.* Illinois, 146 U. S., 387.

It is the general law that a grant by the legislature itself of a privilege or franchise does not restrict the power to enforce regulations for the public safety not inconsistent with the essential rights granted by the charter.

New Orleans Gas Co. *vs.* La. Light Co., 115 U. S., 650.

If, in any case, it is doubtful whether or not there has been an irrevocable grant of the use of a public highway, the rule applies that the construction favorable to the public and not to the private grantee should prevail.

In considering the rightfulness of the exercise of the governmental power of the city to regulate the use of the streets by railways it is to be noticed in this case that ordinance No. 1, while it is a restriction, does not take away the right to maintain a railway on Lexington street and is not destructive of the object of the ordinance which it, in small part, repeals. The portion of Lexington street on which the railroad company is restricted to one track consists of three short blocks in the heart of the city, where the street is of a steep grade and is less than the usual width, and where it passes some of the principal public buildings. There is shown by the proofs to have been diversity of opinion among the property-

338 owners on the street as to the danger, inconvenience, and obstruction resulting from double tracks, but enough appears to show that the position taken by the city officials and by the city council has strong support, and that it is a case in which it cannot be said that the action of the city council was wanton and in bad faith. With the strong presumption in favor of the reasonableness of the ordinance, I cannot see how, upon the testimony, it can be declared to be unreasonable and oppressive. Cases may be found in which the courts have held, with regard to horse railroads in cities, that it was not a justifiable withdrawal of a valid grant to reduce the railroad to one track, but the special circumstances must control. An electric railroad in its speed, in the weight and momentum of its cars, in the danger to persons on foot and in vehicles (especially when running on frequented and narrow streets), approximates the danger of steam locomotives rather than that of horse cars, and the duty of the city with regard to them is more stringent in proportion to the greater danger.

If the city had ordained that the public safety required that but one car at a time should be allowed on Lexington-street hill, so that there never should be both one ascending and one descending, it

would be difficult to maintain that such an ordinance was not a proper exercise of the power to regulate the use of the street. The restriction to one track accomplishes the same result, with the advantage that the track is in the middle of the street.

339 In my judgment, the restriction to the use of one track under the circumstances is an exercise of a governmental power which the city never parted with and subject to which the "North-avenue ordinance" was accepted by the railroad company.

I have briefly stated my dissent without citation or discussion of authorities for the reason that the authorities have been fully cited and discussed in the opinions delivered in the court of appeals of Maryland in the case of the Lake Roland Elevated Company *vs.* Mayor, etc., of Baltimore, 77 Md., 352.

340 *Final Decree.*

Filed November 17, 1894.

In the Circuit Court of the United States for the District of Maryland. (In Equity.)

THE BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee, Plaintiff,
vs.
MAYOR AND CITY COUNCIL OF BALTIMORE, Defendant.

Final decree.

The above cause coming up for final hearing and having been submitted by the parties for a final decree, the respective counsel for the parties were heard by the court and the proceedings read and considered.

And it appearing to the court that the Lake Roland Elevated Railway Company is lawfully authorized to construct and maintain double electric railway tracks on Lexington street, in the city of Baltimore, between Charles street and North street, and to operate its cars upon said tracks, as provided in ordinance No. 23, approved April 8th, 1891, of the ordinances of the mayor and city council of Baltimore; and

341 it appearing, also, that ordinance No. 1, approved November 18th, 1892, of the ordinances of the mayor and city council of Baltimore is in violation of the tenth section of the first article of the Constitution of the United States of America, and is therefore void; and it appearing, also, that the plaintiff is entitled to a perpetual injunction for the purpose and in the manner and form prayed in its bill of complaint filed in said cause:

It is thereupon, this seventeenth day of November, in the year eighteen hundred and ninety-four, by the circuit court of the United States for the district of Maryland, sitting as a court of equity, adjudged, ordered, and decreed that the demurrer heretofore filed by defendant to the bill, be, and the same is hereby, overruled, and that

the Mayor and City Council of Baltimore, its officers, agents, and employees, be, and they are hereby, perpetually enjoined and restrained from interfering in any manner or form with the said Lake Roland Elevated Railway Company, its officers, agents, or employees, in the construction and maintenance of two parallel tracks on Lexington street, between Charles street and North street, or interfering in any manner with said Lake Roland Elevated Railway Company in the operation of its electric cars upon and over said two parallel tracks, provided that said two tracks are laid and maintained and said cars operated thereupon in conformity with the provisions of ordinance No. 23, approved April 8th, 1891, of the ordinances of the mayor and city council, and in conformity with the general regulations of the said mayor and city council of Baltimore relating
to the construction and operation of such street railways not
342 inconsistent with the provisions of said ordinance No. 23, approved April 8th, 1891, as aforesaid.

It is further ordered that the plaintiff recover of defendant the costs of this suit by the said plaintiff expended, to be taxed by the clerk.

NATHAN GOFF,
U. S. Circuit Judge.

343 *Petition for Allowance of Appeal, Assignment of Errors, and Order of Court Allowing the Appeal and Fixing Amount of Supersedeas Bond.*

Filed November 22, 1894.

In the Circuit Court of the United States for the District of Maryland. In Equity.

BALTIMORE TRUST AND GUARANTEE COMPANY, Trustee, Plaintiff,
vs.
MAYOR AND CITY COUNCIL OF BALTIMORE, Defendant.

To the Honorable Thomas J. Morris, judge, &c.:

The Mayor and City Council of Baltimore, the above-named defendant, conceiving itself aggrieved by the final decree entered on the 17th day of November, A. D. 1894, in the above-entitled cause, doth hereby appeal therefrom to the Supreme Court of the United States, and said defendant prays that its appeal may be allowed, and that your honor will prescribe the amount of bond to be given to operate as a supersedeas, and that upon the approval and filing of
said bond the injunction set forth in said decree shall be sus-
344 pended during the pendency of this appeal. Your petitioner further prays that a transcript of the record of proceedings and evidence in this cause, duly authenticated, may be sent to the said Supreme Court, to the end that the said decree may reversed.

And this petitioner is advised and alleges that in the record and proceedings in the above-entitled cause there are manifest errors, which it assigns as follows:

Assignment of Errors.

First. There was error in the court's overruling the defendant's general demurrer to the bill of complaint and finding that a Federal question was involved in the matters complained of in said cause, and that said court had jurisdiction in the said suit.

Second. There was error in the court's overruling the defendant's general demurrer to the bill of complaint and refusing to dimiss the plaintiff's bill, because the circuit court had no jurisdiction to entertain said cause.

Third. There was error in the court's finding and decreeing that the Lake Roland Elevated Railway Company was lawfully authorized to construct and maintain double electric railway tracks on Lexington street, in the city of Baltimore, between Charles street and North street, and to operate its cars upon said tracks as provided in ordinance No. 23, approved April 8th, 1891.

345 Fourth. There was error in the court's finding and decreeing that ordinance No. 1, approved November 18th, 1894, was in violation of the tenth section of the first article of the Constitution of the United States of America, and was therefore void.

Fifth. There was error in the court's finding and decreeing that the plaintiff was entitled to a perpetual injunction for the purpose and in the manner and form prayed in its bill of complaint filed in said cause.

Sixth. There was error in the court's finding and deciding under the pleadings, exhibits, and proof that the plaintiff was entitled to a perpetual injunction in manner and form as prayed in the complaint filed in this cause, there being no sufficient proof that there had been any default under the mortgage making the plaintiff trustee of the indebtedness of the Lake Roland Elevated Railway Company, or of the insolvency of said company, or that the security of the bonds is appreciably lessened by ordinance No. 1, approved November 18th, 1892.

Seventh. That there was error in the court's finding and decreeing under the pleadings, proof, and exhibits in this case that the plaintiff was entitled to maintain this suit, there being no legally sufficient proof to show that the alleged bondholders authorized or consented to the bringing of this suit by plaintiff, or that said bondholders are non-residents of State of Maryland, or that there are any *bona fide* bondholders who became such prior to the amend-

346 ing ordinance No. 1 of 1892 and prior to the city's claim of the right to amend the ordinance No. 23 of 1891 or without notice of said claim, who paid value for the same, or any proof that any one is interested in this suit except the Lake Roland Elevated Railway Company, or that this suit is anything more than an attempt, by making untrue and colorable allegations of interests in bondholders, to get the circuit court of the United States to act as a court of review of the court of appeals of Maryland, and to have this honorable court amend the decision of that high tribunal in a

suit in which it had clear jurisdiction and in which its jurisdiction was first invoked by the real plaintiff in this case.

Eighth. There was error in the court's finding that under the pleadings, evidence, and exhibits in said cause that there was involved in said cause a Federal question, and that the court had jurisdiction to entertain said suit.

Ninth. There was error in the court's finding that under the pleadings, evidence, and exhibits in said cause that the plaintiff was entitled to maintain its suit, and that the court had jurisdiction to entertain said suit.

Tenth. There was error in the court's finding that under the pleadings, evidence, and exhibits in said cause the court had jurisdiction of said suit and in refusing to dismiss said bill.

Eleventh. There was error in the court's finding that the
347 plaintiff was not concluded and estopped from maintaining its suit by the decree of the court of appeals of Maryland in the case of Lake Roland Elevated Railway against Mayor and City Council of Baltimore.

Twelfth. There was error in the court's finding that the Lake Roland Elevated Railway Company had not consented and acquiesced in ordinance No. 1, approved November 25th, 1892, and consented to and acquiesced in a single track on Lexington street between Charles and North streets, and that the plaintiff was not bound by such consent and acquiescence.

Thirteenth. There was error in the court's finding and decreeing that ordinance No. 1, approved November 18th, 1892, was in violation of the tenth section of the first article of the Constitution of the United States, and was therefore void, because the amendment of section 1 of ordinance No. 23, approved April 8th, 1891, by ordinance No. 1, as appears from the terms and language of said ordinance No. 1, and the pleadings, evidence, and exhibits in this cause was the reasonable exercise by the legislative department of Baltimore city of the police power delegated to it to protect the public safety, welfare, and convenience from the danger and inconvenience of railway cars passing on two tracks in opposite directions at same time, at intervals of one and one-half minutes, propelled by electricity at the speed of ten miles an hour over one of its crowded public streets or highways in the centre of said city, which street was too narrow to permit vehicles which used said street of
348 certain width to stop on said street outside of said tracks or to pass cars standing or passing on said tracks, and which was the only driveway unobstructed by railway tracks between the eastern and western limits of said city, by an amendment to ordinance No. 23 which substituted for the distance of 1,100 feet, or three squares, of a route of double railway tracks of several miles in length through the streets of the city, with two southern termini in centre of city a few squares apart, of one railway track and switch for two railway tracks for said distance of 1,100 feet, or three squares, which exercise of said police power by said city by ordinance No. 1, to protect the public safety and welfare, as aforesaid, by amendment or regulation of the license, privilege, grant, or contract given

by ordinance No. 23, was not a violation of section ten of article 1 of the Constitution of the United States and void.

Fourteenth. There was error in the court's finding and decreeing that ordinance No. 1, approved November 18th, 1892, was in violation of the tenth section of the first article of the Constitution of the United States, and was therefore void, because the amendment of section 1 of ordinance No. 23, approved April 8th, 1891, by the amendment of ordinance No. 1 by substituting one railway track and switch for two railway tracks on Lexington street, between Charles and North streets, for the distance of 1,100 feet, or three squares, was the exercise by the legislative department of the city of Baltimore of the reserved power of said city conferred by
349 the act of 1892 of the legislature of Maryland, chapter 112, over ordinance No. 23, in the following language: "The mayor and city council to have the power and control hereafter in reference to the enforcement, amendment, or repeal of said ordinance (ordinance No. 23) as it has or would have in respect to any ordinance passed under the general powers," and ordinance No. 1 was not in violation of section ten of the first article of the Constitution of the United States and void.

Fifteenth. There was error in the court's finding and decreeing that ordinance No. 1, approved November 18th, 1892, was in violation of the tenth section of the first article of the Constitution of the United States, and therefore void, because the amendment of ordinance No. 23 by ordinance No. 1 by substituting one railway track and a switch on Lexington street for the distance of 1,100 feet, or three squares, for two railway tracks was not a destruction or impairment of the right of the Lake Roland Elevated Railway Company to run its cars or enjoy and exercise its street railway franchise on Lexington street for the distance aforesaid, nor the destruction or impairment of any essential or substantial right conferred by ordinance No. 23, but only a regulation of the use of Lexington street for the distance aforesaid under the power conferred on the city by the act of the legislature of Maryland, act of 1890, chapter 370, passed before said ordinance No. 23, and which provided "that they (mayor and city council of Baltimore) shall have power to regulate the use of the streets, lanes, and alleys in said city
350 by railway or other tracks, etc.," and that the exercise of said power of regulation of the use of Lexington street by ordinance No. 1 under the power conferred by the act of 1890, chapter 370, was not in violation of section ten of article 1 of the Constitution of the United States and void.

Sixteenth. There was error in the court's finding and decreeing that ordinance No. 1, approved November 18th, 1892, was in violation of the tenth section of the first article of the Constitution of the United States, and was therefore void, because ordinance No. 23 was but a privilege, license, or permit to the Lake Roland Elevated Railway Company, the successor of the North Avenue Railway Company, to use Lexington street for the distance of 1,100 feet with two railway tracks, which privilege, license, or permit was subject to alteration, amendment, or repeal by the legislative department of

the city of Baltimore whenever, in its judgment, the public welfare required the same; that ordinance No. 1 was the exercise of that power by the city of Baltimore over the privilege, license, or permit contained in ordinance No. 23. The city of Baltimore held the title of Lexington street, as well as all of its streets, in trust for the benefit of the general public, and could not, as to such trust property, enter into an irrepealable contract and grant an easement in perpetuity for the erection and use by railway companies of any of its streets with railway tracks; that the city of Baltimore has never had conferred on it by the legislature of Maryland the power
351 to consent or enter into an irrepealable contract with street railway companies or other persons, companies, or corporations for the use of the streets for any purpose whatsoever; that the provision of the general railway act in section 169 of Code of Maryland, article 23, the same being the codification of the act of 1876, chapter 242, the language of which is: "And provided further, that no railroad company shall be allowed to pass through the city of Baltimore without the consent of the municipal authorities," both from its language and from judicial decision, does not apply or relate to street railways using the streets of said city. The court of appeals of Maryland, on the 13th of July, 1882, long before the passage of ordinance No. 23, in case of Hodges *versus* Baltimore Passenger Railway Company, 58th Maryland, 622, had in express language so declared. The court's language was as follows, after quoting the above and other sections of the said railway act: "These provisions, it is plain, have no reference to the construction of street railways for passengers. There is, then, no general law conferring the rights and prescribing the terms and conditions on which the defendant (Baltimore Passenger Railway Company) was to construct and operate its railway on certain streets in the city of Baltimore." The only power the city had in the matter of the use of its streets by street railways was the control and supervision of said streets under its general power, which only permitted a license or permit to be given by said city to said companies to use said streets with railway tracks, subject to alteration, amendment, or
352 repeal by the legislative department of the city, as the public welfare required, and ordinance No. 1, being the exercise of such power, was not in violation of section 10 of article 1 of the Constitution of the United States and void.

Seventeenth. That there was error in the court's neglecting, refusing, and omitting to sustain the exceptions filed on 4th day of May, 1893, by the defendant to certain affidavits filed by the plaintiff for reasons in said exceptions set forth.

Eighteenth. That there was error in the court's finding and decreeing that ordinance No. 1, approved November 18th, 1892, was in violation of the tenth section of article 1 of the Constitution of the United States, and therefore void, because the amendment of ordinance 23, approved April 8th, 1891, by ordinance No. 1, approved November 18th, 1892, was a valid exercise of the power conferred upon the city of Baltimore by the act of the General Assembly of Maryland of 1890, chapter 370, passed prior to the aforesaid

ordinance No. 23, which act gave the mayor and city council the unqualified power to repeal *in toto* any grant, franchise, license, or privilege made to any street railway company to use the streets of the city for street railway tracks whenever the public interests, in the judgment of the municipal authorities, so required, and that the exercise of such power of repeal to the extent of one track only on Lexington street for the distance of 1,100 feet was not in
353 violation of article 1, section 10, of the Constitution of the United States and void.

Nineteenth. There was error in the court's finding and decreeing that ordinance No. 1, approved November 18th, 1892, was in violation of the tenth section of the first article of the Constitution of the United States, and was therefore void, because ordinance No. 23, of April, 1891, which was amended and restricted by said ordinance No. 1, was a permit, privilege, or license granted by the mayor and city council of Baltimore to the North Avenue Railway Company by virtue of the powers conferred on the said mayor and city council for the first time by the General Assembly of Maryland of 1890, chapter 370; that the sole capacity which the said mayor and city council had to grant the privileges conferred by said ordinance No. 23 was under the power conferred by the said act of 1890, chapter 370, "to regulate the use of the streets by railway and other tracks;" that this same grant of power to the city authorities to permit the use of the streets by railway companies with railway tracks conferred on them the right and made it their duty to revoke the permit so granted whenever, in their judgment, the exigency of the public interest so required, and the said ordinance No. 1, being the exercise by the municipality of this reserve power, was not in conflict with section 10, article 1, of the Constitution of the United States and void.

354 Twentieth. There was error in the court's refusal to pass a decree dismissing the plaintiff's bill with costs, to be paid by plaintiff.

THOMAS G. HAYES,
City Counsellor,
WILLIAM S. BRYAN, JR.,
City Solicitor,
Solicitors for Defendant.

Ordered, this the 22nd day of November, 1894, that the appeal above prayed is hereby allowed and the amount of the appeal bond is hereby fixed at fifty thousand dollars, and when approved and filed shall act as a supersedeas, and that the operation of the injunction ordered to be issued by the decree in this cause shall be suspended during the pendency of said appeal.

THOMAS J. MORRIS, *Judge.*

355 *Appeal Bond.*

Filed November 26, 1894.

Know all men by these presents that we, the Mayor and City Council of Baltimore, as principal, and Ferdinand C. Latrobe and James R. Horner, as sureties, are held and firmly bound unto the Baltimore Trust and Guarantee Company, trustee, in the full and just sum of fifty thousand dollars, to be paid to the said The Baltimore Trust and Guarantee Company, trustee, its certain attorney, successors, or assigns; to which payment, well and truly to be made, the Mayor and City Council of Baltimore aforesaid binds itself and its successors, and the said Ferdinand C. Latrobe and James R. Horner bind themselves, their heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of November, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a circuit court of the United States for the fourth circuit in and for the district of Maryland, in a suit depending in said court between The Baltimore Trust and Guarantee Company, trustee, plaintiff, and The Mayor and City Council of Baltimore, defendant, a decree was rendered against The Mayor and City Council of Baltimore, defendant, as aforesaid, and the Mayor and City Council of Baltimore aforesaid having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the

356 Baltimore Trust and Guarantee Company, trustee, aforesaid, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the Mayor and City Council of Baltimore aforesaid shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Corporate Seal of the City of Baltimore.]

FERDINAND C. LATROBE, *Mayor.* [SEAL.]
JAMES R. HORNER. [SEAL.]
FERDINAND C. LATROBE. [SEAL.]

Sealed and delivered in presence of—
JOS. W. WHITEFORD.

Which said bond is thus endorsed:
"Approved Nov. 26, 1894. Thos. J. Morris, judge."

357 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Baltimore Trust and Guarantee Company, trustee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within

30 days from the date hereof, pursuant to an appeal from a decree of the circuit court of the United States for the fourth circuit in and for the district of Maryland in your favor, passed in a cause in said court wherein The Mayor and City Council of Baltimore is defendant and you are plaintiff, to show cause, if any there be, why the decree rendered against the said defendant in said cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

The Seal of the Circuit Court, Maryland.

Witness the Honorable Thomas J. Morris, judge of the said circuit court of the United States, this 26th day of November, in the year of our Lord one thousand eight hundred and ninety-four.

THOS. J. MORRIS, *Judge.*

Test: JAS. W. CHEW,
Clerk of said Circuit Court.

358 [Endorsed:] Service of the within citation acknowledged this 28th day of November, A. D. 1894. Steele, Semmes & Carey, counsel for complainant.

359 Thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme court of the United States, and the same is transmitted accordingly.

JAS. W. CHEW, *Clerk.*

UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

I, James W. Chew, clerk of the circuit court of the United States for the fourth circuit in and for the district of Maryland, do hereby certify that the foregoing is a full and true transcript of the record and proceedings of the said circuit court, together with all things thereunto relating, in the therein-entitled cause.

The Seal of the Circuit Court, Maryland.

In testimony whereof I hereunto set my hand and affix the seal of the said circuit court this 21st day of December, A. D. 1894.

JAS. CHEW,
Clerk of said Circuit Court.

Endorsed on cover: Case No. 15,762. Maryland C. C. U. S. Term No., 878. The Mayor and City Council of Baltimore, appellants, *vs.* The Baltimore Trust and Guarantee Company, trustee. Filed December 31, 1894.

Office Supreme Court, U. S.
FILED.
JAN 6 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

No. 209. OCTOBER TERM, 1896.

Appeal from the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Appellant.

vs.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, TRUSTEE,

Appellee.

BRIEF FOR APPELLANT.

THOMAS G. HAYES,
City Counselor,
THOMAS IRELAND ELLIOTT,
City Solicitor,
Counsel for Appellant.

Office Supreme Court, U. S.
FILED.
JAN 6 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

No. 209. OCTOBER TERM, 1896.

Appeal from the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Appellant,

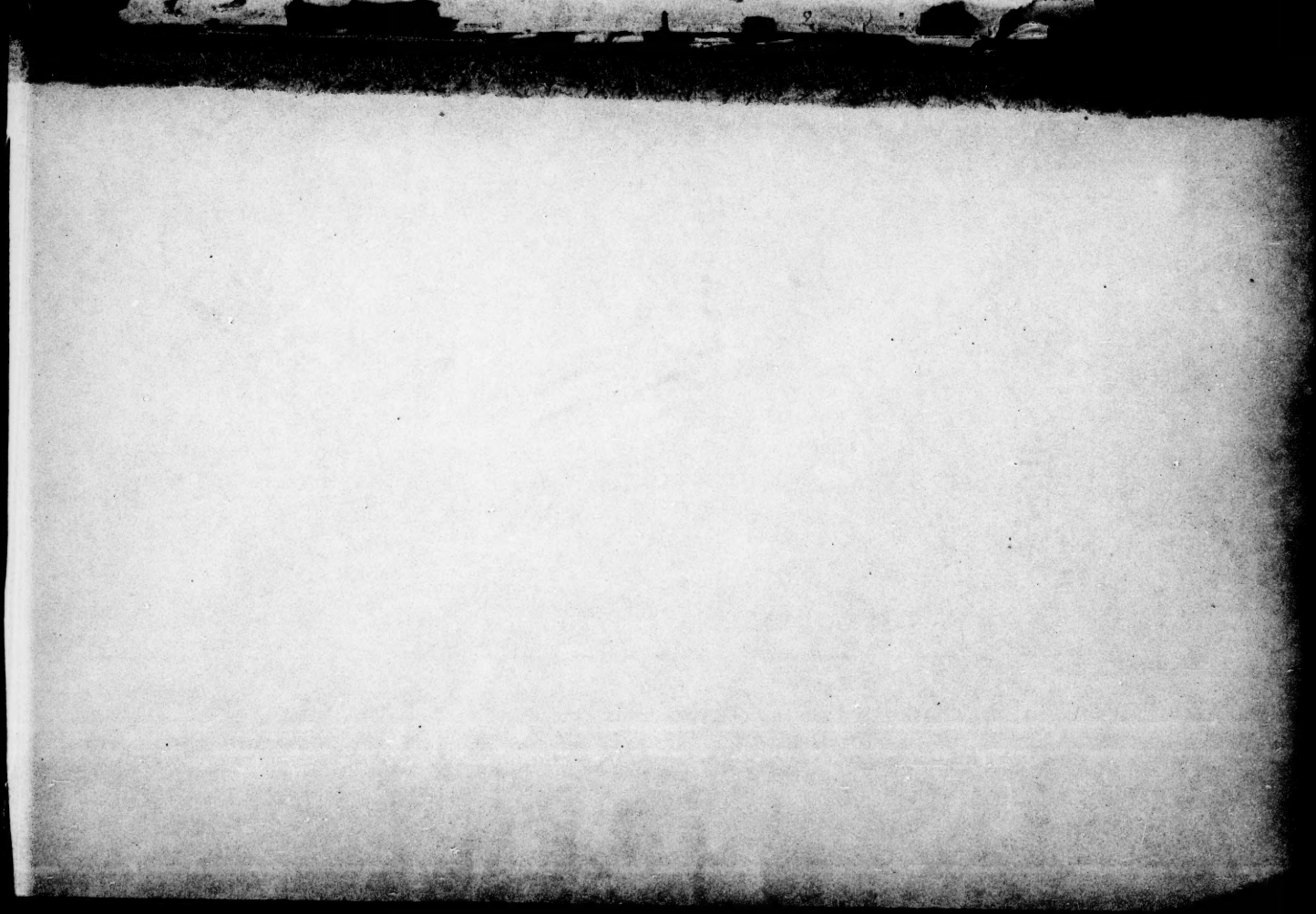
vs.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, TRUSTEE,

Appellee.

BRIEF FOR APPELLANT.

THOMAS G. HAYES,
City Counselor,
THOMAS IRELAND ELLIOTT,
City Solicitor,
Counsel for Appellant.



IN THE

Supreme Court of the United States

No. 209. OCTOBER TERM, 1896.

Appeal from the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Appellant,

vs.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, TRUSTEE,

Appellee.

BRIEF FOR APPELLANT.

THOMAS G. HAYES,
City Counselor,
THOMAS IRELAND ELLIOTT,
City Solicitor,
Counsel for Appellant.

BALTIMORE, MD.
PRINTED BY KING BROTHERS
1896

TABLE OF CONTENTS.

	PAGE
1.—Statement of the Case	1
2.—Assignment of Errors	5
3.—Argument	13
I. Ordinance No. 1, authorized as a *revocation in part of a license*	14
II. Ordinance No. 1, authorized under the *police power*	52
III. Ordinance No. 1, authorized under *reserved power of amendment* contained in Act 1892, Chapter 112	67
IV. Ordinance No. 1, authorized under *power of regulation* contained in Act 1890, Chapter 370	76
V. Review of Judge Goff's Opinion	83
VI. Review of Appellee's Authorities relied on below	94
VII.—Conclusion	99
4.—Appendix	101
1. Act 1890, Chapter 370	101
2. Act 1892, Chapter 112	101
3. Ordinance No. 23	103
4. Ordinance No. 1	112
5. Chief Judge Alvey's Opinion	114
6. Mayor's Message with Ordinance No. 1	118
7. News Items and Editorial from Baltimore Sun	119
8. Railway Act	122

IN THE

Supreme Court of the United States

No. 209. OCTOBER TERM, 1896.

Appeal from the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Appellant.

vs.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, TRUSTEE,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The appellant, defendant below, is the municipality of the city of Baltimore, whose corporate name is "Mayor and City Council of Baltimore." The appellee, complainant below, is The Baltimore Trust and Guarantee Company, a body corporate, created under the laws of the State of Maryland. The appellee sues in the capacity of trustee, being named as such under a mortgage (Record, 14) executed by a street railway company, named the Lake Roland Elevated Railway Company, to secure a certain issue of bonds made by

this company. These bonds were issued and disposed of on the *6th day of August, 1892.* (Record, 216.) The appeal is from a decision of the Circuit Court of the United States for the Fourth Circuit, in Equity. The Court below was composed of Circuit Judge Goff and District Judge Morris, and was divided in its decision of the case, Judge Goff deciding and signing the decree in favor of the appellee, and Judge Morris dissenting. The opinions of both judges are reported in 64 F. R. 153, and are contained in the Record, commencing on pages 224 and 232, respectively.

This suit was instituted after the decision of the Court of Appeals of Maryland, in favor of the appellant in this appeal, in the case of *Lake Roland E. Ry. Co. vs. Mayor, &c., of Baltimore*, 77 Md. 354, a full record of which case, with the opinions of *Chief Judge Alvey* and *Judge Bryan* are contained in the record of the case at bar (Record, 65–192), and which case involved exactly the same question as to the legality of a certain Ordinance passed by the appellant and known as Ordinance No. 1, approved November 18, 1892, (Record, 30 and Appendix,) and to be designated hereafter in this brief as Ordinance No. 1. Ordinance No. 1 was passed as an amendment to a prior Ordinance, known as Ordinance No. 23, approved April 8, 1891, (Record, 58 and Appendix,) and to be hereafter designated in this brief as Ordinance No. 23. Ordinance No. 1 was passed upon the suggestion of the Mayor of Baltimore contained in a special message sent by him to the City Council. (Record, 100 and Appendix.) Ordinance No. 23 granted a license or privilege to a street railway company, known as the North Avenue Railway Company of Baltimore City, to be hereafter designated in this brief as the North Avenue Company, which was incorporated (Record, 75,) as a street railway on the 6th May, 1889, under the General Laws of the State of Maryland, contained in Code, Article 23, of the Public

General Laws; the license contained in this Ordinance was to use certain streets in the City of Baltimore for the purposes of a street railway, with two iron tracks, one of which streets named in Ordinance No. 23 was a portion of Lexington street between North and Charles streets, being three squares of 1,100 feet in length.

By an agreement of consolidation entered into between the North Avenue Company and other street railways on April 20, 1892, a new street railway corporation was formed to succeed to the rights and privileges of each of the constituent corporations. (Record, 77.) This new company was named the Lake Roland Elevated Railway Company to be hereafter designated in this brief as the Lake Roland Company, and by virtue of this consolidation and agreement the Lake Roland Company acquired whatever rights the North Avenue Company possessed under Ordinance No. 23.

The Charters of these companies did not confer the power to enter the city of Baltimore and occupy its streets without the leave and license of the municipality; but merely the capacity or franchise of being a street railway in Baltimore City.

On a part of the route defined in Ordinance No. 23, it was provided in the Ordinance that the North Avenue Company might erect an elevated structure for its tracks to pass over those of a certain steam railroad. After the passing of Ordinance No. 23, it was found that the city of Baltimore had no power under the railway law to grant a license to erect an elevated structure in its streets; and it became necessary for the North Avenue Company to apply to the Legislature of Maryland for a ratification of Ordinance No. 23, which was accordingly done, and the Act of 1892, chapter 112, (Appendix,) was passed, which after, by its terms, ratifying Ordinance No. 23, provided as follows:

"The said Mayor and City Council to have the same power and control hereafter, in reference to the enforcement, *amendment* or *repeal* of said Ordinance, as it has, or would have, in respect to any Ordinance *passed under its general powers.*"

Ordinance No. 1 repealed that portion of Ordinance No. 23 which authorized the double tracks on Lexington street, but permitted the laying on this street of a single track, in lieu of the double track, on certain conditions. The situation and condition of Lexington street, which made necessary Ordinance No. 1, is thus described in the opinion of *Judge Bryan*, (Record, 185):

"Douglas street has recently been opened and extended so as to connect with Lexington street and make a continuous thoroughfare from the western extremity of the city, to a remote point in the eastern part. The cost of this improvement, including paving, was about six hundred thousand dollars. There is no street between Lexington and the water on the south, which is not obstructed in some part of it by railway tracks, and none nearer, than on the north, nine blocks distant, which can be used as a thoroughfare from the western to the eastern part of the city. The City Hall is at the southeast corner of North and Lexington streets, and on Lexington between North and Calvert streets, are the fire engine house No. 4, and the office of the Liquor License Board on the north side, and on the south side the United States post office building, in which are the rooms of the United States Court and the Internal Revenue office. Between Calvert and St. Paul are the Court-House of the city (with its principal entrance on Lexington) and the Record Office; and the other buildings between Calvert and Charles are principally used for offices of lawyers and real estate brokers. By measurement it is shown that the distance between the overhanging sides of the cars and the gutter, on the south side of Lexington street between Charles and Calvert, will vary from four to seven inches to three feet eight inches, and on the north side it varies from four feet seven inches to three feet four inches, and between Calvert and North streets, on the south side, the side of the car will project one inch over the outside edge of the gutter, and on the north side, it will vary from

eight feet two inches to eight feet ten inches. Measurements were also made of different vehicles, ranging from the large furniture van to the small one-horse carriages, and it was found that they measured from eight feet four inches, for the largest, to six feet one inch, for the smallest. The maximum rate of speed allowed for the cars on this part of the track is ten miles an hour. The distance from North to Charles streets being eleven hundred feet, if the cars run at half the permitted speed they will pass over this space in two and a half minutes. And it is stated in the bill of complaint, that at certain hours of the day it will be 'necessary to run cars on Lexington street at intervals of three or two minutes and sometimes at an interval of one minute apart.'

"It must be very obvious that the existence of these tracks is incompatible with this part of the street as a driveway."

The plats in the record show the situation of the tracks on Lexington street and the distances, as well as space, allowed for vehicles. (Record, 176.)

The Constitutional objection to Ordinance No. 1, set up by the appellee, is, that by the substitution of *one* track, for *two*, before any tracks were laid on Lexington street, for a distance of 1100 feet, the value of the privilege conferred by Ordinance No. 23, in this respect, is diminished, and the security of the bondholders under the mortgage in question represented by the apppellee is lessened, and thus it is claimed Ordinance No. 1 impairs the obligation of the contract between the appellant, the bondholders and the Lake Roland Company, the successor of the North Avenue Company, as contained in Ordinance No. 23, and hence violates Article 1, section 10, of the Constitution of the United States.

The jurisdiction in this case of the Federal Courts rests solely on the fact of this claim of the appellee. Both parties are residents and citizens of the State of Maryland.

ASSIGNMENT OF ERRORS.

First. There was error in the Court's overruling the defendant's general demurrer to the bill of complaint

and finding that a Federal question was involved in the matters complained of in said cause, and that said Court had jurisdiction in the said suit.

Second.. There was error in the Court's overruling the defendant's general demurrer to the bill of complaint and refusing to dismiss the plaintiff's bill, because the Circuit Court had no jurisdiction to entertain said cause.

Third. There was error in the Court's finding and decreeing that the Lake Roland Elevated Railway Company was lawfully authorized to construct and maintain double electric railway tracks on Lexington street, in the city of Baltimore, between Charles street and North street, and to operate its cars upon said tracks as provided in Ordinance No. 23, approved April 8th, 1891.

Fourth. There was error in the Court's finding and decreeing that Ordinance No. 1, approved November 18th, 1894, was in violation of the tenth section of the first article of the Constitution of the United States of America, and was therefore void.

Fifth. There was error in the Court's finding and decreeing that the plaintiff was entitled to a perpetual injunction for the purpose and in the manner and form prayed in its bill of complaint filed in said cause.

Sixth. There was error in the Court's finding and deciding under the pleadings, exhibits, and proof, that the plaintiff was entitled to a perpetual injunction in manner and form as prayed in the complaint filed in this cause, there being no sufficient proof that there had been any default under the mortgage making the plaintiff trustee of the indebtedness of the Lake Roland Elevated Railway Company, or of the insolvency of said company, or that the security of the bonds is appreciably lessened by Ordinance No. 1, approved November 18th, 1892.

Seventh. That there was error in the Court's finding and decreeing under the pleadings, proof, and exhibits

in this case, that the plaintiff was entitled to maintain this suit, there being no legally sufficient proof to show that the alleged bondholders authorized or consented to the bringing of this suit by plaintiff, or that said bondholders are non-residents of State of Maryland, or that there are any *bona fide* bondholders who became such prior to the amending Ordinance No. 1 of 1892, and prior to the city's claim of the right to amend the Ordinance No. 23 of 1891, or without notice of said claim, who paid value for the same, or any proof that any one is interested in this suit except the Lake Roland Elevated Railway Company, or that this suit is anything more than an attempt, by making untrue and colorable allegations of interests in bondholders, to get the Circuit Court of the United States to act as a Court of Review of the Court of Appeals of Maryland, and to have this honorable Court amend the decision of that high tribunal in a suit in which it had clear jurisdiction and in which its jurisdiction was first invoked by the real plaintiff in this case.

Eighth. There was error in the Court's finding that under the pleadings, evidence, and exhibits in said cause that there was involved in said cause a Federal question, and that the Court had jurisdiction to entertain said suit.

Ninth. There was error in the Court's finding that under the pleadings, evidence, and exhibits in said cause that the plaintiff was entitled to maintain its suit, and that the Court had jurisdiction to entertain said suit.

Tenth. There was error in the Court's finding that under the pleadings, evidence, and exhibits in said cause the Court had jurisdiction of said suit and in refusing to dismiss said bill.

Eleventh. There was error in the Court's finding that the plaintiff was not concluded and estopped from maintaining its suit by the decree of the Court of Appeals of Maryland in the case of Lake Roland Elevated Railway against Mayor and City Council of Baltimore.

Twelfth. There was error in the Court's finding that the Lake Roland Elevated Railway Company had not consented and acquiesced in Ordinance No. 1, approved November 25th, 1892, and consented to and acquiesced in a single track on Lexington street between Charles and North streets, and that the plaintiff was not bound by such consent and acquiescence.

Thirteenth. There was error in the Court's finding and decreeing that Ordinance No. 1, approved November 18th, 1892, was in violation of the tenth section of the first article of the Constitution of the United States, and was therefore void, because the amendment of section 1 of Ordinance No. 23, approved April 8th, 1891, by Ordinance No. 1, as appears from the terms and language of said Ordinance No. 1, and the pleadings, evidence, and exhibits in this cause was the reasonable exercise by the legislative department of Baltimore city of the police power delegated to it to protect the public safety, welfare, and convenience from the danger and inconvenience of railway cars passing on two tracks in opposite directions at same time, at intervals of one and one-half minutes, propelled by electricity at the speed of ten miles an hour over one of its crowded public streets or highways in the centre of said city, which street was too narrow to permit vehicles which used said street of certain width to stop on said street outside of said tracks or to pass cars standing or passing on said tracks, and which was the only driveway unobstructed by railway tracks between the eastern and western limits of said city, by an amendment to Ordinance No. 23 which substituted for the distance of 1,100 feet, or three squares, of a route of double railway tracks of several miles in length through the streets of the city, with two southern termini in centre of city a few squares apart, of one railway track and switch for two railway tracks for said distance of 1,100 feet, or three squares, which exercise of said police power by said city by Ordinance No. 1, to

protect the public safety and welfare, as aforesaid, by amendment or regulation of the license, privilege, grant, or contract given by Ordinance No. 23, was not a violation of section ten of Article 1 of the Constitution of the United States and void.

Fourteenth. There was error in the Court's finding and decreeing that Ordinance No. 1, approved November 18th, 1892, was in violation of the tenth section of the first article of the Constituiion of the United States, and was therefore void, because the amendment of section 1 of Ordinance No. 23, approved April 8th, 1891, by the amendment of Ordinance No. 1 by substituting one railway track and switch for two railway tracks on Lexington street, between Charles and North streets, for the distance of 1,100 feet, or three squares, was the exercise by the legislative department of the City of Baltimore of the reserved power of said city conferred by the Act of 1892 of the Legislature of Maryland, chapter 112, over Ordinance No. 23, in the following language: "The Mayor and City Council to have the power and control hereafter in reference to the enforcement, amendment, or repeal of said Ordinance (Ordinance No. 23) as it has or would have in respect to any Ordinance passed under the general powers," and Ordinance No. 1 was not in violation of section ten of the first Article of the Constitution of the United States and void.

Fifteenth. There was error in the Court's finding and decreeing that Ordinance No. 1, approved November 18th, 1892, was in violation of the tenth section of the first article of the Constitution of the United States, and therefore void, because the amendment of Ordinance No. 23 by Ordinance No. 1 by substituting one railway track and a switch on Lexington street for the distance of 1,100 feet, or three squares, for two railway tracks was not a destruction or impairment of the right of the Lake Roland Elevated Railway Company to run its cars or enjoy and exercise its street railway franchise on

Lexington street for the distance aforesaid, nor the destruction or impairment of any essential or substantial right conferred by Ordinance No. 23, but only a regulation of the use of Lexington street for the distance aforesaid under the power conferred on the city by the Act of the Legislature of Maryland, Act of 1890, chapter 370, passed before said Ordinance No. 23, and which provided "that they (Mayor and City Council of Baltimore) shall have power to regulate the use of the streets, lanes, and alleys in said city by railway or other tracks, etc.," and that the exercise of said power of regulation of the use of Lexington street by Ordinance No. 1 under the power conferred by the Act of 1890, chapter 370, was not in violation of section ten of article 1 of the Constitution of the United States and void.

Sixteenth. There was error in the Court's finding and decreeing that Ordinance No. 1, approved November 18th, 1892, was in violation of the tenth section of the first article of the Constitution of the United States, and was therefore void, because Ordinance No. 23 was but a privilege, license, or permit to the Lake Roland Elevated Railway Company, the successor of the North Avenue Railway Company, to use Lexington street for the distance of 1,100 feet with two railway tracks, which privilege, license, or permit was subject to alteration, amendment, or repeal by the legislative department of the city of Baltimore, whenever, in its judgment, the public welfare required the same; that Ordinance No. 1 was the exercise of that power by the city of Baltimore over the privilege, license, or permit contained in Ordinance No. 23. The city of Baltimore held the title of Lexington street, as well as all of its streets, in trust for the benefit of the general public, and could not, as to such trust property, enter into an irrepealable contract and grant an easement in perpetuity for the erection and use by railway companies of any of its streets with railway tracks; that the city of Baltimore has never had confer-

red on it by the Legislature of Maryland the power to consent or enter into an irrepealable contract with street railway companies or other persons, companies, or corporations for the use of the streets for any purpose whatsoever; that the provision of the General Railway Act in section 169 of Code of Maryland, Article 23, the same being the codification of the Act of 1876, chapter 242, the language of which is: "And provided further, that no railroad company shall be allowed to pass through the city of Baltimore without the consent of the municipal authorities," both from its language and from judicial decision, does not apply or relate to street railways using the streets of said city. The Court of Appeals of Maryland, on the 13th of July, 1882, long before the passage of Ordinance No 23, in case of Hodges *versus* Baltimore Passenger Railway Company, 58th Maryland, 622, had in express language so declared. The Court's language was as follows, after quoting the above and other sections of the said Railway Act: "These provisions, it is plain, have no reference to the construction of street railways for passengers. There is, then, no general law conferring the rights and prescribing the terms and conditions on which the defendant (Baltimore Passenger Railway Company) was to construct and operate its railway on certain streets in the city of Baltimore." The only power the city had in the matter of the use of its streets by street railways was the control and supervision of said streets under its general power, which only permitted a license or permit to be given by said city to said companies to use said streets with railway tracks, subject to alteration, amendment, or repeal by the legislative department of the city, as the public welfare required, and Ordinance No. 1, being the exercise of such power, was not in violation of section 10 of article 1 of the Constitution of the United States and void.

Seventeeth. That there was error in the Court's neglecting, refusing, and omitting to sustain the exceptions

filed on 4th day of May, 1893, by the defendant to certain affidavits filed by the plaintiff for reasons in said exceptions set forth.

Eighteenth. That there was error in the Court's finding and decreeing that Ordinance No. 1, approved Nov. 18, '92, was in violation of the tenth section of article 1 of the Constitution of the United States, and therefore void, because the amendment of Ordinance 23, approved April 8th, 1891, by Ordinance No. 1, approved November 18th, 1892, was a valid exercise of the power conferred upon the city of Baltimore by the Act of the General Assembly of Maryland of 1890, chapter 370, passed prior to the aforesaid Ordinance No. 23, which Act gave the Mayor and City Council the unqualified power to repeal *in toto* any grant, franchise, license, or privilege made to any street railway company to use the streets of the city for street railway tracks whenever the public interests, in the judgment of the municipal authorities, so required, and that the exercise of such power of repeal to the extent of one track only on Lexington street for the distance of 1,100 feet, was not in violation of article 1, section 10, of the Constitution of the United States and void.

Nineteenth. There was error in the Court's finding and decreeing that Ordinance No. 1, approved November 18th, 1892, was in violation of the tenth section of the first article of the Constitution of the United States, and was therefore void, because Ordinance No. 23, of April, 1891, which was amended and restricted by said Ordinance No. 1, was a permit, privilege, or license, granted by the Mayor and City Council of Baltimore to the North Avenue Railway Company, by virtue of the powers conferred on the said Mayor and City Council for the first time by the General Assembly of Maryland of 1890, chapter 370; that the sole capacity which the said Mayor and City Council had to grant the privi-

leges conferred by said Ordinance No. 23, was under the power conferred by the said Act of 1890, chapter 370, "to regulate the use of the streets by railway and other tracks;" that this same grant of power to the city authorities to permit the use of the streets by railway companies with railway tracks conferred on them the right and made it their duty to revoke the permit so granted, whenever, in their judgment, the exigency of the public interest so required, and the said Ordinance No. 1, being the exercise by the municipality of this reserve power, was not in conflict with section 10, article 1, of the Constitution of the United States and void.

Twentieth. There was error in the Court's refusal to pass a decree dismissing the plaintiff's bill with costs, to be paid by plaintiff.

ARGUMENT.

The Assignment of Errors, without waiving the others, which will be relied on in this appeal and presented and discussed in the brief, will be the *Sixteenth*, *Thirteenth*, *Fourteenth* and *Fifteenth*, and will be considered in this order.

The errors in substance set forth in the above assignments are as follows:

Sixteenth. That Ordinance No. 23 is not a contract, as the appellant had no power under its charter to enter into a contract granting a vested right of an easement in perpetuity or for a definite term in its streets for their use by railway tracks, but a *license* revocable when the public necessities required it, and can lawfully be altered or amended as was done by Ordinance No. 1, and this latter Ordinance does not impair the obligation of a contract and is not a violation of the Federal Constitution.

Thirteenth. That the power to amend Ordinance No. 23, as was done by Ordinance No. 1, in substituting a single track for a double track on Lexington street for 1100 feet, was lawful under the *police power* of the appellant over its streets, and does not impair the obligation of a contract, and is not a violation of the Federal Constitution.

Fourteenth. That under the Act of *1892, Chapter 112* (Appendix), the power to amend Ordinance No. 23, was expressly reserved to the appellant, and Ordinance No. 1 was the exercise of that *reserved power of amendment*, and was lawful, and did not impair the obligation of a contract, and is not a violation of the Federal Constitution.

Fifteenth. That under the Act of *1890, Chapter 370* (Appendix), Ordinance No. 1 was but the exercise of the power of *regulation* of the use of Lexington street by the railway tracks of the Lake Roland Company, conferred on the appellant by this Act; and as Ordinance No. 23 was subsequent in date to said Act, said Ordinance must be held as accepted, subject to the power of regulation provided for in this Act, and Ordinance No. 1, even if it destroyed essential rights of the Lake Roland Company, which is denied, is lawful and does not impair the obligation of a contract, and is not a violation of the Federal Constitution.

I.

Sixteenth Assignment of Errors.

The City of Baltimore holds the title to its streets in trust for the benefit of the general public, and cannot as to such trust property enter into an irrepealable grant or contract conveying a vested right of an easement in perpetuity or for a definite term, in the bed of its streets for the uses and purposes of a street railway. The City of Baltimore has never had conferred on it by the Legislature of Maryland the power

to make such an irrepealable grant or contract; its only power over its streets being that of legislative control, supervision and regulation under its general powers. Ordinance No. 1 is, therefore, a lawful exercise by the City of Baltimore of its legislative power of control over the revocable license, granted by Ordinance No. 23, and does not impair the obligation of a contract, and is not in violation of section 10 of Article 1 of the Constitution of the United States.

The decree of the Court below (Goff, C. J.; Morris, D. J., dissenting,) involves the denial of the above proposition, which is the error stated in the Sixteenth Assignment of Errors.

1. *The first inquiry which presents itself in considering the above proposition is: What are the powers of the City of Baltimore, under its charter, over the streets within its corporate limits, as expressed in Statutes and interpreted by the Courts of the State, and the rules of law to be followed by this Court in construing the same?*

A. In the charter of Baltimore, among other things, as to the city's control over the streets within its limits, it is provided:

> "The Mayor and City Council of Baltimore shall have full power to provide for laying out, opening, extending, widening, straightening or closing up, in whole or in part, any street, square, lane or alley within the bounds of said city, which, in their opinion, the public welfare or convenience may require, &c."
>
> *Code Local Laws*, Article 4, Section 806.

And again—

> "All the streets, lanes or alleys opened in the manner directed in the preceding sections shall be public highways, and be subject to the laws, regulations and Ordinances applicable to public streets, lanes or alleys, or parts thereof, in said city."
>
> Ibid., Section 814.

Other sections of the charter provide for grading, paving and cleaning the streets, lanes and alleys of the city.

Ibid., Sections 811 and 819.

The Legislature of Maryland, in 1890, in amplification of the aforegoing general power conferred on the city of Baltimore over its streets, passed the Act of 1890, chapter 370, set out in full in the appendix, in which the Mayor and City Council of Baltimore was invested with *express* authority "to *regulate* the use of the streets, lanes and alleys of the city by *railway tracks or other tracks.*"

There have been repeated judicial decisions by the Court of Appeals of Maryland as to the power of control, &c., by the city, of its streets, under the above general powers conferred by its charter, and the extent of the power.

On the 13th July, 1882, the Court of Appeals, in an opinion delivered by *Judge Ritchie*, declared:

> "The streets are under the exclusive control of the city, as avenues of travel, and whatever precaution may be reasonably taken to secure the safety of those who use them, is but effectuating the object of such highways and discharging a corporate responsibility."
>
> *Textor vs. B. & O. Railroad Co.*, 59 Md. 63, 64.

Later, on the 28th January, 1892, in a case in which the North Avenue Railway Company, the predecessor and grantor of the Lake Roland Elevated Railway Company, was a party, *Chief Judge Alvey*, speaking for the Court of Appeals, said:

> "The Mayor and City Council of Baltimore are invested with full power and authority over the streets of the city, including North avenue, and all the streets and alleys of the city are declared to be public high-

ways. (Code of Local Laws, Art. 4, secs. 806, 810, 814 and 820.) The General Assembly of 1890, by Act, Ch. 370 (see appendix), for the purpose of conferring additional authority on the Mayor and City Council, provided 'that they shall have power to regulate the *use of the streets*, lanes and alleys in said city, *by railway or other tracks*, gas or other pipes, telegraph, telephone, electric light or other wires and poles, in, under, over or upon the same,' &c."

North Balto. P. Ry. Co. vs. North Ave. Ry. Co., 75 Md. 233, 238.

Chief Judge Alvey, on the 28th January, 1892, *over six months before the bonds in question were issued and disposed of*, August 6, 1892, being the date of their issue and disposal, in a brief but forcible statement, speaking for the Court of Appeals, in answer to the claim of a street railway company as to the use of the city's streets, declared that the control of the city of Baltimore over its streets must be *retained*, and cannot be *granted away or surrendered*. His language was as follows:

"The control of the streets and highways of the city must be *retained* in the power of the municipality, and cannot be *granted away* or *surrendered* to *other agencies* not authorized by the State to assume control of the streets or highways of the city."

North Balto. P. Ry. Co. vs. Mayor, &c., Balto., 75 Md. 247, 250.

This authoritative statement of this distinguished *Judge*, speaking for the Court over which he so long presided, completely sustains the proposition under consideration; because if the City of Baltimore can, under its charter, grant to a street railway a vested right of an easement in perpetuity or for a definite term in the bed of its streets for street railway tracks, then surely it has not "*retained*" the control over its streets, but has "*granted away or surrendered to other agencies*" this control, which is so clearly declared by the Court of Appeals in the above quotation to be beyond its power.

Thus stood the judicial construction as to the power of the appellant over the streets of Baltimore City, under its charter, prior to the decision by the Court of Appeals on the 16th March, 1893, of the case of the *Lake Roland Elevated Ry. Co. vs. Mayor, &c., of Baltimore*, 77 Md. 352, 364; see also Record, page 177. *Which case involved the idential question as in this appeal, viz., the validity of Ordinance, No. 1.* In that case *Judge Bryan* who delivered the opinion of the Court on the first hearing as to this question, says:

> "It has been for a long time recognized as the law, that the Mayor and City Council of Baltimore have full and complete control over the streets and highways of the City. It had been considered, however, that certain uses could not be made of them without the sanction of an Act of the General Assembly. For this reason the Legislature saw fit to enlarge the corporate powers of the City. The Act of 1890, chapter 370, entitled 'An Act * * * giving the Mayor and City Council (of Baltimore) authority to regulate the use of the streets, lanes and alleys of said city, by railway or other tracks, &c.,' provided as follows (Act quoted in full). *Under the authority of this Act, the City Council passed Ordinance No. 23, approved April 8th, 1891.*" (Appendix.)

It is to be noticed that in the concluding words of the above extract, *Judge Bryan* decides that the very Ordinance No. 23, the one amended by Ordinance No. 1, and involved in this appeal, was passed under these general powers of the city of Baltimore over its streets.

Chief Judge Alvey, in the same case, 77 Md. 384, see also Record, page 189, who delivered the opinion of the Court of Appeals, refusing a rehearing, repeats substantially what *Judge Bryan* had, in the original opinion, said. The *Chief Judge*, on this subject, says:

> "The Mayor and City Council, by statutory provision, are invested with *express* authority 'to *regulate the use* of the streets, lanes and alleys of the city by *railway or other tracks*,' and this, as I understand it, is but *an amplification of their general power* over, and right and duty to *regulate and maintain the streets and other highways of the city for the use of the public.*"

This Court thus sees that under the provisions of the Charter of the city of Baltimore and the judicial interpretation and construction of that Charter, the only power the city of Baltimore has over its streets is the general power generally conferred on all municipal corporations, and which *Chief Judge Alvey* defines to be the *"right and duty to regulate and maintain the streets and other highways of the city for the use of the public."*

It is also to be noticed that this construction of the charter powers of the city over its streets was a part of the city of Baltimore's charter by judicial interpretation long before the passage of Ordinance No. 23. *See Textor's case, supra.* And before the issue and disposal of the bonds in question. See *North B. P. Ry. Case, supra.* And under this general power, as before noted, Ordinance No. 23 was passed. See *Lake Roland case, supra.*

The city of Baltimore, having only such general powers over its streets as appear from its charter and judicial decisions cited, has no power under these provisions to consent by an irrepealable grant or contract to the use of its streets for the purposes of street railway tracks in perpetuity or for a definite term; this control by the city, of its streets, has been declared by the Courts of the State, must be *retained* and not *surrendered.*

Under another head of this brief, it will be endeavored to be shown that under the general powers which the city of Baltimore has under its charter over its streets, it can only grant a revocable license to a street railway company to use its streets for the purposes of street railway tracks and a street railway, and can pass no irrepealable Ordinance conferring such right, but for the present it is desired to confine the consideration of the Court solely to the question as to the provisions of the city's charter relating to its continuing control over its

streets, and especially the views of the Court of Appeals of Maryland as to the appellant's charter power over its streets, as expressed in the *Lake Roland Ry. Co. Case, supra.*

Chief Judge Alvey, in his opinion delivered in the *Lake Roland Elevated Railway Co. case, supra,* in which the identical question as to the validity of Ordinance No. 1, *was* involved as in the case at bar, repeated more at length the same construction of the city's charter as he had given in 75 Md. 250, *supra.* The Mayor and City Council of Baltimore was appellee, and the Lake Roland E. Ry. Co. was the appellant in the State Court, while the Baltimore Trust and Guarantee Co., as trustee for the bondholders, is the appellee, and City of Baltimore, appellant, in the case at bar.

The portion of the opinion of *Chief Judge Alvey* relating to the charter powers of the city of Baltimore over its streets, as given in the above case of the *Lake Roland E. Ry. Co.*, is as follows:

> "This power to maintain and regulate the use of the streets of the city is a trust for the benefit of the general public, and the primary use of the streets is not, by any means, that of furnishing tracks for street railways. The Mayor and City Council cannot divest themselves of this trust, nor can they so restrict their power over the streets as to defeat or seriously impair the beneficial enjoyment of the streets by the public in the ordinary and usual modes of passage thereon. The power vested in them in respect to the streets is of a *legislative character, and they can neither restrict themselves nor their successors by any irrepealable ordinance* in the exercise of such power over the streets *except it be by the express authority of the Legislature of the State.* The power is a continuing one, to be exercised whenever the public needs may require it, and hence the power to regrade and improve the streets from time to time must remain subject to the judgment and discretion of the legislative

branch of the municipal government. But if the contention of the appellant could be maintained, the streets on which the railway tracks are once laid might and most generally would pass out of the control of municipal authority. For, however, improvident or reckless might be the grant of privileges to street railway companies, or however much the tracks might obstruct the use of the streets by the general public, perpetual easements or servitudes would be created in the streets, and the municipal authorities would be precluded from the exercise of the ordinary power of changing grades or making other improvements of the street that might naturally interfere with the tracks or the operation of the road, though public necessity for such improvement might be never so urgent; and in such case the only means of reclaiming the street to the absolute control of the city authorities and to the general public use would be by a resort to the power of eminent domain. But in this case, to say nothing of the general indefeasible nature of the legislative power vested in the Mayor and City Council in respect to the streets, *the express statutory reservation of the power to regulate the use of the streets by railways secures to the Mayor and City Council the paramount right at all times to control the street, and to determine that no more than a single track should be maintained thereon.*" (Record, 190.)

This clear and forcible exposition of the charter powers of Baltimore city over its streets, on the identical question involved in this appeal, that is to say, the validity of Ordinance No. 1, if not absolutely conclusive to this Court, is entitled to the greatest consideration.

In the same case, *Judge Bryan*, in the original opinion filed by him, gives substantially the same construction to the charter power of the city of Baltimore over its streets. He says:

"The control of the city over the streets, is attended with the duty of preserving them for their legitimate purposes. They are intended for the passage of the people over them on foot, on horseback and in vehicles, on their various occasions of business, convenience and pleasure. It is not competent for the city to defeat the primary purposes for which they were dedicated to the public use. They are highways, and must be main-

tained as highways so long as they are kept in existence. The power over the streets is held on the same trusts as the other legislative powers conferred on the Mayor and City Council. It is intended to be used for the purpose of preserving them in the character of streets, in such condition as they may be most suitable for the public use. It is of incalculable importance to the public interest, and there can be no more reason to suppose that the city can abridge or surrender this legislative power than any other." (Record, 186.)

It is respectfully submitted that the opinions of these two eminent Judges, speaking for the Court of Appeals of Maryland, should be conclusive of the fact that under the charter of Baltimore, it could not enter into a contract with a street railway, as to the use of its streets, or grant a vested right in the same.

It is firmly settled that the control of a municipal corporation over its streets, in the absence of an express power conferred by the Legislature to enter into contractual relations for their use, and grant a vested right in the use of the same, is, as said, both by *Chief Judge Alvey* and *Judge Bryan* in the above quotations from their opinions, *legislative*, and the municipal corporation cannot divest itself of this legislative discretion conferred upon it; nor can it surrender such discretion by contract, nor bind itself not to exercise it whenever it may become necessary so to do.

Goszler vs. Georgetown, 6 Wheaton, 593.
Town of East Harford vs. Harford Bridge Company, 10 How. 545.
Smith vs. Washington, 20 How. 135.
Peoples Railroad vs. Memphis Railroad, 10 Wall. 38.
Brick Presbyterian Church vs. New York, 5 Cowen, 540.
State vs. Graves, 19 Md. 351.
1 *Dillion, M. Corp.*, sec. 97.
Sedgwick Const. and St. Law, 534.
Illinois, Central R. Co. vs. Illinois, 146 U. S. 387.

Before closing this division of the brief, there is a single remaining observation to be made as to what the appellant supposes was an error, into which the learned *Circuit Judge* (Goff, J.,) of the Court below fell, in *construing* the charter of the city of Baltimore.

In his opinion, (Record, bottom 228), the Judge says:

> "The general railway Act of 1876, gave the municipal corporation of Baltimore, the general power to *consent* or refuse assent to the use of its streets by railroad tracks."

This is not a fact in so far as the construction by the Maryland Court of Appeals of the Railway Act is concerned, for it has decided flatly to the contrary. Not only have we the emphatic expressions of the Court of Appeals by both *Chief Judge Alvey* and *Judge Bryan* in the quotations given above from their opinions in the *Lake Roland Elevated Ry. Co. case, supra*, where identically the same question was presented, but as far back as the 13th July 1882, long before Ordinance No. 23 was passed, the Court of Appeals of Maryland decided that the very section to which Judge Goff refers was not applicable to street railways in Baltimore city. This case is referred to and the position of the appellant is stated in full in its sixteenth Assignment of Errors, (Record, 241, and brief, 10,) as follows:

> "That the provision of the general railway act in section 169 of the Code of Maryland, article 23, the same being the codification of the Act of 1876, chapter 242, the language of which is: '*And provided further, that no railroad company shall be allowed to* PASS THROUGH *the city of Baltimore, without the consent of the municipal authorities;*' both from the language [and context] and from judicial decision does not apply or relate to street railways using the streets of said city. The Court of Appeals of Maryland, on the 13th of July, 1882, long before the passage of Ordinance, No. 23, in case of *Hodges vs. Baltimore Passenger Railway Company*, 58 Md. 622, had in express language so declared.

The Court's language was as follows, after quoting the above and other sections of said railway act: '*These provisions, it is plain, have no reference to the construction of street railways for passengers. There is then, no general law conferring the rights and prescribing the terms and conditions on which the defendant, (Baltimore Passenger Railway Company,) was to construct and operate its railway on certain streets in the City of Baltimore.*'"

Without this decision it is apparent from the language, "pass through the City of Baltimore," and context and connection in which the provision in section 169, above given, is used, that it does not apply to street railways. The next section 170, which refers to the railroads named in section 169, fixes the price at three (3) cents a mile for transporting passengers, and for freight charges, excepting coal ores or other minerals, five (5) cents per mile, and as to coal ores and other minerals, a rate not exceeding one and a half (1½) cents per ton per mile.

The provision in section 169 refers clearly to steam railroads engaged in hauling passengers and freight, which desire to construct their route through the corporate limits of Baltimore city.

Whether the opinion of *Judge Goff* would have been different from what it was, had he not fallen into this error, the appellant does not know; but it is apparent that his assumption that the Railway Act empowered the City of Baltimore to *consent* to the use of its streets for street railway tracks, was clearly erroneous.

In the case of *Lake Roland Elevated R. Co. supra*, both *Chief Judge Alvey* and *Judge Bryan*, in substance, say there is no statutory provision empowering the appellant to *consent* to the use of its streets under an irrepealable contract. They both say Ordinance 23 was a revocable license, as the appellant could grant nothing else. If they had supposed the

169th section of article 23, P. G. L., referred to street railways, it would have been impossible for them to have so held. That case is, therefore, a direct affirmance of *Hodges vs. Balto. Pas. Ry. Co., supra.*

In the recent case of *Garrett vs. Lake Roland Elevated R'y Co.*, 79 Md. 277, 287, the Court of Appeals of Maryland, in referring to section 169 of Article 23, P. G. L., and Ordinance 23, makes this statement in its opinion:

> "The North Avenue Railway Company, one of the corporations forming the Lake Roland Elevated Railway, was incorporated under Article 23 of the Code, and section 169 of that article holds every railroad company laying its tracks upon any public street responsible for 'injuries done to private property' lying upon or near to such street 'by such location;' and the damages thus occasioned may be recovered by civil action."

This case is referred to because it may be claimed by the appellee that the express previous adjudication in the 58 Md. case, *supra*, and equally implied adjudication in the 77 Md. case, *supra*, that the 169th section of Article 23 does not apply to street railways, was overruled by the Court of Appeals in this case. That such is not the effect of this decision, a moment's consideration will show. In the first place, if this provision as to damages in section 169 is applicable to street railways, it does not follow that the concluding provision of same section as to the *consent* of the city being necessary for railroads "*passing through*" the limits of the city is also applicable to street railways, which would be in the teeth of the previous decisions of same Court; and, secondly, the Court was referring to an elevated railroad on the same footing as a steam railroad, with this difference, that the appellant could not, under the provisions of section 186 of Article 23, by its *consent* issue a license to occupy its streets by an elevated railroad, as it required a special Act of the Legislature, as shown by Act 1892, chapter 112. (Appendix.)

There is no power conferred on the appellant, either by its charter or the charter of the street railways, or any other law, to CONSENT *or to grant the use of its streets by contract in perpetuity or for a definite term, to street railways for street railway purposes.*

The only power the city has, under its charter, in respect to granting the use of its streets to street railways, as so clearly put by *Chief Judge Alvey*, in the 77 Md. *case, supra* is that which it possesses under its general power to grant a revocable license, or permit. An Ordinance creating a vested right in an easement in perpetuity or for a definite term in the streets, would be *ultra vires* and void.

B. In considering the charter powers of the appellant over its streets, as interpreted and construed by the highest Court of the State, which created the appellant; this Court is asked to apply two well-known principles of law to these judicial interpretations and constructions, and to the grant itself, as contained in Ordinance No. 23.

First. The construction placed upon the charter powers of the City of Baltimore by the highest Court of the State of Maryland, hereinbefore cited, both before and after the issue of the bonds in question and before and after the passage of Ordinance No. 23, which was the license and only authority to construct a street railway in the streets of the city of Baltimore, possessed by the North Avenue Company, the predecessor of the Lake Roland Company, must be, under repeated decisions of this Court, whether right or wrong, accepted as binding on this Court, in so far as the powers of the appellant under its charter, in the respect under consideration, are concerned. With this construction accepted by this Court, it is then to say, whether that

construction impairs the obligation of any contract under section 10, Article 1, of the Federal Constitution.

To restate the proposition: the highest State Court has decided, as we have seen, in *Textor's case*, 59 Md, 64, before the passage of Ordinance No. 23 and before the issue of the bonds in question, that the streets of Baltimore are under its "exclusive control," and that precautions "to secure the safety of those who use them," is "a corporate responsibility."

In *North Balto. P. Ry. Co. case, supra*, before the issue of the bonds in question, the same Court said:

> "The control of the streets and highways of the city must be *retained* in the *power of the municipality*, and cannot be *granted away or surrendered*."

In the *Lake Roland E. Ry. Co. case, supra*, the same Court, after the passage of Ordinance No. 23 and issue of the bonds, said:

> "That the city cannot enter into an irrevocable grant or contract as to the use of its streets by street railway tracks, and that Ordinance No. 1 is a valid exercise of its power over its streets."

This decision was but the affirmance of the law as previously stated in 59 and 75 Md.

Is not this construction binding on this Court, the Lake Roland Co., the bondholders, and appellee? And if so, how can there be an impairment of the obligation of any contract in the passage of Ordinance No. 1?

In *Louisiana vs. Pilsburg*, 105 U. S. 278, a writ of error to the Supreme Court of Louisiana, this Court said through Mr. *Justice Field* on this subject:

> "The exposition given by the highest tribunal of the State (statutory construction) must be taken as correct so far as contracts make under the Act are concerned."

The learned *Justice* in the above case in his opinion said the above rule is to be followed whether such con-

struction was sound or not in so far as the law relates to contracts made after such construction. The construction by the State Court, he said, is to have the same effect as an *amendment to the statute under consideration.*

In the case of *Weightman vs. Clark*, 103 U. S. 256, appeal from the U. S. Circuit Court of Illinois, by Mr. *Chief Justice Waite*, this Court announced the same rule of law as follows:

> "As a rule, we treat the construction which the highest Court of a State has given a statute of the State as a part of the statute itself. It is only when, by giving such construction a retroactive effect, it will invalidate contracts which in our opinion were lawfully made, that we disregard them."

Within the past few months, this Court, in a full discussion of this same question, in an appeal from a Federal Court, has declared the same rule through Mr. *Justice Peckham*, in *Fallenbrook Irrigation Co. vs. Bradley*, 164 U. S. 112, and in the case of *Baltimore Traction Co. vs. Balto. Belt R. Co.*, 151 U. S. 137, on Writ of Error to the Court of Appeals of Maryland, the same law has been laid down by this Court.

In the 164 U. S. *case, supra*, an appeal from the U. S. Circuit Court of California, the Court said:

> "We are therefore practically confined in this case to the inquiry whether the Act in question, *as it has been construed by the State Courts*, violates the Federal Constitution."

Second. The rule of law universally accepted by the Courts in construing charters or grants to private corporations, conferring public privileges or rights in derogation of the public at large, is to resolve every doubt in favor of the public.

This canon of construction has been by no Court more steadfastly and firmly upheld than by this Court.

Among some of this Court's earliest decisions, as well among some of its latest, this principle of law relating to the construction of such grants has been announced and enforced.

In *Minturn vs. Larue*, 23 How. 436, this principle of law was thus announced:

> "That only such powers and rights can be exercised under them as are clearly comprehended within the words of the Act, or derived therefrom by necessary implicaton, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature, *must be resolved in favor of the public.*"

In *Oregon Railway & Navigation Co. vs. Oregon Railway Co.*, 130 U. S. 126, Mr. *Justice Miller*, in delivering the opinion of the Court, said:

> "It is to be remembered when a statute making a grant of property or of powers, or of franchises to a private individual or private corporation, becomes the subject of construction as regards the extent of the grant, the universal rule, is that in doubtful points the construction shall be against the grantee and in favor of the government or the general public."

Mr. *Justice Brewer*, when a Circuit Judge, in *Jackson Co. Horse R. Co. vs. Interstate R. T. Co.*, 24 F. R. 308, put the same rule of construction, in the following terse words:

> "Hence, the familiar rule that charters, grants of franchises, privileges, &c., are to be construed in favor of the government. Doubts as to what is granted are resolved in favor of the grantor, or, as often epigrammatically said, *a doubt destroys a grant.*"

Mr. *Chief Judge Alvey*, for the Court of Appeals of Maryland, stated the same principle of law, in relation to municipal grants to street railways, in the case of *North Baltimore Pass. Railway Co. vs. North Ave. Rail-*

way Co., 75 Md. 233, 243, (Appellee, Licensee or Grantee under Ordinance No. 23.) He said:

> "It is a well-settled principle that no implication will be indulged in derogation of the rights of the public, in the absence of express or plain terms of grant. * * * * * * * * * This is an established principle applicable in the construction of grants by the State, *and it is equally applicable in the construction of grants or privileges by a municipal corporation affecting public rights.*"

If this rule of construction, as thus stated, is applied to Ordinance No. 23, and the question asked: Is there a *doubt* either under the general charter powers of the appellant, as construed by the highest Court of the State, which limits it to the grant of a *revocable license* to street railways to use its streets, or under its *police power* over its streets, or under the *reserved power of amendment* contained in the Act of 1892, chapter 112, to amend Ordinance No. 23, or under the power of *regulation* of the use of the streets by railway tracks conferred on the appellant by the Act of 1890, chapter 370, that the appellant can, by Ordinance No. 1, require the Lake Roland Company for 1,100 feet on Lexington street, (of its miles of route over the streets of the city of Baltimore,) in the construction of its road, to place one iron track instead of two iron tracks? The appellant insists that there can be no *doubt* under either and all four of the foregoing recited powers, that the appellant can require this of the Lake Roland Company; but if there were a *doubt* as to the grant contained in Ordinance No. 23; then, in the language of *Judge Brewer*, in 24 F. R., 308, "*the doubt destroys the grant.*"

2. *The general powers conferred by charter on municipal corporations to open, control and regulate the streets within their limits, this being the only power conferred by the charter of Baltimore city, will not authorize an irre-*

vocable grant in perpetuity or for a definite term to street railways to occupy the streets for railway purposes; such a grant would be that of a vested right of an easement in the streets equivalent to the grant of a property right in the bed of the streets, commensurate with the purposes for which they are to be used, and would operate as an abridgment of the legislative power of control over the streets by the municipal corporation making the grant. A revocable license by the municipality to a street railway company to the use of its streets for street railway purposes, under its general power over the streets within its limits, would be the extent of the power of such municipal corporation.

This proposition has the support of an unbroken line of decisions of the Federal Courts where the exact question has been presented, and the weight of opinions both as to number and force of reasoning in the State Courts.

The following cases fully sustain the above proposition:

People Passenger R. Co. vs. Memphis City R. Co. 10 Wall 38.

Detroit Citizens' St. Ry. Co. vs. Detroit, 22 U. S. App. 570, 584.

Detroit vs. Detroit City Ry. Co. 56 F. R. 867, 874.

Jackson Co. Horse R. Co. vs. Interstate Rapid Transit Ry. Co. 24 F. R. 306, 308.

Davis vs. New York, 14 N. Y. 506.

Milhau vs. Sharp, 27 N. Y. 611.

Memphis City R. Co. vs. Memphis, 4 Cold. 406.

Louisville City R. Co. vs. Louisville, 8 Bush 415.

Boston vs. Richardson, 13 Allen, 160.

Nash vs. Lowry, 37 Minn. 26; S. C. 33 N. W. Rep. 787.

State vs. Trenton, 36 N. J. L. 79.

North Balto. Pass. Ry. Co. vs. Baltimore, 75 Md. 247, 250.
Lake Roland Elevated Ry. Co. vs. Baltimore, 77 Md. 357.

The question as to the power of a municipality, under its general powers of control of its streets, by an irrevocable grant or contract, giving or granting to a street railway company, as a vested right, the use of the public streets for street railway purposes, in perpetuity or for a definite term, first arose in the city of New York, and the decision of the Court of Appeals of that State was unequivocally against any municipal corporation under its general powers over its streets, possessing any such powers.

The two New York cases in which this question arose were *Davis vs. New York*, 14 New York, 506, and *Milhau vs. Sharp*, 27 New York, 611. The opinions in these cases are full and able discussions of this question, with approval of the doctrine contended for by the appellant in the case at bar. These cases have become leading ones on this question, and have met, so far as the writer of this brief is aware, with universal approval by text writers on municipal law, and both the Federal and State Courts which have passed on the question. Mr. Dillon, in his most excellent work on municipal corporations, fully approves the principles of law as held and decided in these cases. This Court has expressly referred approvingly to two of them; the U. S. Circuit and District Courts have approved and followed them, and there is found no State Court, so far as has been discovered, where the city's charter and the facts were the same, which has not adopted the principles of law relating to the limitations on the power of municipal corporations in the matter of grants of the use of their streets, as announced by these learned New York Judges.

It therefore becomes proper, after submitting to the Court the following suggestion, to consider at length these two leading New York cases.

It will be found that the cases, both Federal and State, which have declared void, grants made by municipal corporations, under their general powers without express authority from the Legislature, to street railways of the use of their streets in perpetuity or for a definite term, for street railways purposes, have based their decisions upon either one or more of the three following distinct and separate grounds.

1. That the grant is that of a FRANCHISE, which the State alone can confer.

2. That the grant is EXCLUSIVE.

3. That the grant was a CONTRACT and irrevocable, and not a revocable license, and hence the municipal corporation surrendered or abridged its trust of control over its streets, which it could not do.

It is only the last reason, as above given, with which we are concerned in this appeal, and the cases hereafter cited in support of the correctness of the appellant's contention are limited to this reason; where it is otherwise, in part, in the cases, it will be noted.

NEW YORK. The case of *Davis vs. New York, supra*, was decided by the Court of Appeals of New York in 1859, and was a suit instituted by Davis and other owners of lots on Broadway, against the city of New York, and Sharp and others, the grantees, by a Resolution of the Common Council of the City of New York, of the privilege of constructing a street railway on

Broadway and other streets. The suit was an action to restrain by injunction, the defendants from constructing the street railway in question, and to have declared the Resolution in question, null and void, which the Court did.

The portion of the Resolution relating to the grant, as given in quotation in the statement of the case, is as follows:

> "Resolved, that Jacob Sharp, (and others named,) have the authority and consent of the Common Council to lay a double Railway track in Broadway, (and other streets); the said grant and authority being upon the following conditions and stipulations, to wit, &c."

These conditions which follow and are embraced in quotation, relate solely to the mode and manner of construction, and are as follows: The construction to be under the direction of the Street Commissioner, the rails to be in or near the middle of the street, rails not to exceed a certain distance apart and flush with the pavement, height and size of rails, which are to be laid on present grade of streets, or on the grades which may hereafter be established, to keep the streets between the rails and one foot on each side of rails in repair, and horse power only to be used below Fifty-ninth street.

The statement of the case, after quoting this portion of the Resolution, adds:

"Further matter of details were prescribed, arranged under fourteen other divisions."

It is to be noticed that there is no word in the Resolution which in express terms, or by implication, so far as the terms of the grant are concerned, which makes the grant exclusive.

Opinions in this case were delivered by *Denio, C. J., Comstock and Wright, J. J.* The opinion by *Chief Judge Denio* dwells principally on the question of the *exclusiveness* of the grant, and the want of power in the Common Council, to grant the *franchise* of a street railroad to the individuals named in the Resolution, and incidentally he refers to the inability of the municipal government of the City of New York to make an irrevocable grant or contract for the use of its streets by street railways.

Judge Comstock basis his opinion solely upon the want of power in the Common Council, to make an irrevocable grant or contract. He says:

> "Taking, therefore, the whole Ordinance together and giving effect to it according to its terms and intention, it is no less than an abrogation by the Common Council of their powers and duties over and concerning the public streets, and a surrender of a considerable portion of those powers and duties into the hands of private individuals or a private corporation. This the corporation of New York cannot do. Time and experience may give a very unfavorable solution to the question whether this railroad, or any railroad in Broadway can be beneficial to the public; *but the hands of the City Government* will be tied by the *contract* into which it has entered, and future change and improvement may be prevented by the voluntary surrender—in effect in perpetuity—of its own powers. On this ground the Ordinance is void."

Mr. Dillon, in his work on Municipal Corporations, gives his unqualified approval to the doctrine as announced in this case, especially that portion of the opinion of *Judge Comstock* quoted above. After quoting in full the above extract of *Judge Comstock*, he adds, "*and is unquestionably sound.*"

The full quotation from Mr. Dillon's work is as follows:

"The judgment of the Court in the case just mentioned, (Davis vs. New York,) rests upon the sound principle that the powers of a corporation in respect to the control of its streets, are held in trust for the public benefit, and cannot, unless *clearly authorized* by a valid legislative enactment, be surrendered or delegated by *contract* to private parties, either corporate or natural. In this case there was no such authority, and hence the resolution of the Council authorizing private persons to construct and operate a railroad upon certain terms, *without power of revocation*, and without limit as to time, was not a license or act of legislation, but *a contract;* void, however, because, if valid, it would deprive the corporation of the *control and regulation of its streets.* [Then quotes *Judge Comstock* as above, and adds:] This view was subsequently approved by same Court (Milhau vs. Sharp,) *and is unquestionably sound.*" *2 Dillon, M. Corp.*, sec. 716, (4th Ed.)

It is astonishing that notwithstanding this emphatic and unqualified language of approval of Mr. Dillon to the doctrine of the New York cases, yet there are both counsel and Courts which insist that Mr. Dillon holds in section 724 of his work that under the general powers of a municipal corporation, it can by its Common Council or legislative body, make an irrevocable grant or contract with street railways for the use of its streets in perpetuity, or for a definite term, and they quote section 724 of his work as supporting their contention, the language of which section is as follows:

"As respects ordinary railways operated by steam and street railways operated by animal power, legislative authority is necessary to warrant them to be placed in the streets or highways. The legislature may delegate to municipal or local bodies, the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads which connect different towns whose tracks are constructed in the usual manner and whose trains are propelled by steam. But it is otherwise as respects horse railways; these are

for local travel, and the ordinary powers of municipal corporations are often ample enough in the absence of express or other legislation on the subject, indicating a different intent to authorize them *to permit or refuse to permit* the use of streets within their limits for such purposes."

2 Dillon, M. Corp. sec. 724, (4th Ed.)

It will be found that this is the section which has been at times relied on as indicating the approval by *Judge Dillon* of the opposite doctrine of the New York cases. This is true in the only State case discovered which holds to the contrary view. This case is that of *State vs. Corrigan Street Railway Co.*, 85 Mo. 263, and is relied on by *Judge Goff* to support his views as to the general powers of the municipal corporations of Baltimore city, as conferring the power to make an irrevocable grant or contract for the use of its streets.

To say that this section supports a doctrine of law opposed to the law as given in the New York cases, can find first, no support in the language of the section. This learned author says the municipal corporation under their general powers may *permit* the use of its streets by street railways. So say every authority including the New York cases; a *permit* does not necessarily involve an irrevocable grant or contract. Mr. Dillon nowhere in that section or elsewhere in his work on municipal corporations indicates a belief that such an irrevocable grant or contract can be lawfully made by a municipal corporation under its general powers; and second, the opinion of the author as just expressed in a preceding section, (section 716, quoted in brief,) as to the soundness of the law as expounded in the New York cases, is a complete refutation of the idea that this section is intended to advance the doctrine that a city, under its general power, can make an irrevocable grant or contract with a street railway, of a vested right of an easement in perpetuity or for a definite term in the beds of its streets. It is respectfully submitted that Mr. Dillon says no such thing. If he intended to say so

in section 724, he should, for the sake of consistency, have first stricken from his book section 716, *supra*.

Judge Wright said:

> "That the Resolution or Ordinance of the common council authorizing Sharp and his associates to construct and operate the road, was a valid license, revocable at pleasure."

The case of *Milhau vs. Sharp, supra*, involved the construction of the same Resolution as was passed upon in the case in 14 N. Y. 506, and the decision in 14 N. Y. *supra*, was fully approved and affirmed.

Judge Selden, in his opinion, in 27 N. Y. 611, said, as to the Resolution in question:

> "It amounts also to an immediate grant of an interest, and it would seem of a freehold interest, in the soil of the streets of the defendant. * * *
>
> "If that Resolution should be sustained, no power would remain in the corporation to remove the railway after its construction, if it should prove to be a nuisance * * *; and the power of the corporation over the street, in many other respects, would be destroyed. These powers were given to the corporation as a trust, to be held and exercised for the benefit of the public, from time to time, as occasion might require, and they can neither be delegated to others nor efficiently abridged by any act of the corporate authorities."

Judge Selden concludes his opinion on this question by placing his decision as to the void character of the Resolution on the three distinct and separate grounds of (1) franchise granted; (2) exclusive interest or use of street, and (3) divests the city by *contract* of control over the streets. His language is as follows:

> "The Resolution is therefore void, for the reasons that it purports to create a franchise which the common council had no power to create; to vest in the defendants an exclusive interest in the street which the common council had no power to convey; and to divest *the corporation of the exclusive control over the street which has been given to it as a trust for the use of the public, and which it is not authorized to relinquish.*"

These two New York cases have been followed in a number of the highest Courts of the States, some of which decisions are as follows:

KENTUCKY, in 1871, by its Court of Appeals, in *Louisville City Railway Co. vs. Louisville, supra*, a case in which neither the question of the granting of a *franchise* by a municipal corporation or the *exclusiveness* of the grant arose, but solely the question of the power of a municipal corporation under its general powers to make an irrevocable *contract* with a street railway to lay its tracks in its streets, gave the following statement of facts:

> "On the 9th August, 1864, an agreement was entered into between the appellant (Louisville City Railway) and the General Council of the city of Louisville, by which the latter consented that the former might construct and operate a street railroad or railroads over and along certion streets. * * The right of the appellant to operate its railroad was to continue thirty years and until the city should elect to purchase its tracks, cars, grounds &c., and pay therefor in the manner set out in the agreement. * * * Since the consummation of the agreement, the railway corporation has constructed over twenty-four miles of track at a cost of near four hundred thousand dollars. * * * Out of the re-construction of a portion of Jefferson street with the Nicholson pavement grows one of the matters involved in this litigation. The city gave notice to the company that it must remove its tracks upon their streets for the distance of twelve hundred and eighty yards, and put down as the construction of the Nicholson pavement progressed, new tracks of tram rail; otherwise the city would remove such track and construct the pavement without itself providing the tram or other rail, or leaving a space in the pavement for any character of track * * * the company denied the right to the proposed action."

The Court, after the above statement, said, in sustaining the right of the city of Louisville:

> "In determining the legal effect of contracts made with municipal corporations, it must be borne in mind that they have no power to limit their legislative discretion by covenant. They may contract as individuals,

but their legislative enactments must of necessity have the same effect upon their individual contracts as upon those of other persons, artificial or natural, or of the general public. The company derives its right of way over certain of the streets and highways of the City of Louisville *by contract with the city government.* The city, through its municipal officers, holds to some extent the prerogative of government. The General Assembly of the Commonwealth has delegated to it for the common benefit the power to regulate and control the streets and highways. This power the city cannot refuse to exercise when public necessity or convenience demands that it shall be done, nor can it be allowed to excuse its failure in this particular upon the ground *that it has by contract deprived itself of the right to act.*

"*Under the general legislative power of the municipal government to control and regulate the use of the streets of the city, it could not grant to any person or corporation the right to lay down a railway in a street. Such a grant could not be regarded as a legislative act, but rather as a surrender during the term of the grant of one of the powers of the corporation.* (*Milhau vs. Sharp*, 17 Barb. 435.) The right of the General Council to *contract* with the railway company grows out of the special Acts of the Legislature, heretofore quoted."

It is to be noticed in this case, that while the Court of Kentucky gives its full approval to the doctrine of the New York cases, and indeed, incorporates in its opinion a reference to *Milhau vs. Sharp*, and adopts as the law of Kentucky, that under the general powers of a corporation it cannot contract away its power of control over its streets, and after stating that the contract with the railway company, involved in that suit was legal, because authorized by the special Act of the Legislature, yet holds that this contract was subject to that power of control of the City of Louisville, under its general power over its streets, which gave it the right to compel the railway company to change its rails and replace them on Jefferson street, in conformity to the requirements of the General Council of the city.

MINNESOTA, by its Supreme Court, has passed upon the same question, and holds the same doctrine of the New York cases, as to the general powers of a municipal corporation not conferring the power to make an irrevocable grant of its streets to street railways, for the purposes of a street railway.

The case is that of *Nash vs. Lowry*, 37 Minn. 263, S. C. 33 N. W. Rep. 787, the following facts of the case are given in the Court's opinion:

> "January 8th, 1872, the Common Council of the City of St. Paul, passed an ordinance in terms granting to certain persons named * * * permission and authority, and consent of said Council to lay a line of railway * * * in any or all of the streets of said city."

The Court after stating that the Saint Paul City Railway Company became the successors of the individuals named in the original ordinance, under an Act of the Legislature, which confirmed and vested in said corporation the rights specified in the ordinance in question, proceeds:

> "February 7th, 1882, the Common Council passed an Ordinance, which in terms, granted and confirmed and continued to and in the Saint Paul City Railway Company the rights, privileges and franchises granted and specified in said prior Ordinance. By chapter 297, Sp. Laws 1883, the Legislature 'confirmed and validated the Ordinance from February, 1882.' Afterwards, before the commencement of the action, and before said railway company had laid any railway tracks on Pleasant avenue or Oak street, between Sixth and Ramsay streets in said city, but as it was about to lay tracks on Pleasant avenue, the Common Council passed an Ordinance, in these words: '*That any and all authority heretofore granted by Ordinance to any person or persons, company or corporation to lay a railway track on Pleasant avenue or Oak street, between Sixth and Ramsay streets, be, and the same is hereby revoked and repealed.*'"

Chief Judge Gilfillam, after stating the case as above, said:

> "The question in this case is, did the Saint Paul City Railway Company acquire, and does it still have, so far as individuals are concerned, the right to lay its tracks on Pleasant avenue and Oak street, between Sixth and Ramsay streets?
>
> "As held by the Court below, it is immaterial to this question that said company is or is not a corporation. * * * And also, as held by the Court below, *the grant by Ordinance is in the nature of a contract; and if valid, as to the city, the Common Council could not rescind it. The Ordinance when passed was invalid as an irrevocable contract; for it is undoubtedly the rule in accordance both with principle and authority that a municipal corporation entrusted with power of control over public streets cannot by contract or otherwise, irrevocably surrender any part of such power* WITHOUT THE EXPRESS CONSENT OF THE LEGISLATURE, *because such power is in the nature of a trust held by the corporation for the State.*"

The Court then passes to the consideration of the effect of the Act of the Legislature of 1883, which "confirmed and validated" the Ordinance in question, and holds, that by reason of this Act the Ordinance in question was valid, and was given as full force and effect, as if the Common Council had, when it was passed, express power so to do.

The above case presents exactly the contention of the appellant as to the powers of a municipal corporation under its general powers. In the case at bar, there was, as in this case, the Act of 1892, chapter 112, which ratified Ordinance No. 23, but the ratifying Act reserved the power to the City Council to amend or repeal Ordinance No. 23. (Appendix.) This aspect of the case will be discussed under another head of the brief.

MASSACHUSETTS, in the case of *Boston vs. Richardson*, *supra*, where, although the question may not have been

directly involved, yet the Court gives an expression as to its opinion on the question. The Court said:

> "That the town or its officers or any other persons would have the right, without express authority from the Legislature to lay gas pipes or street railways, is not so clear. In Great Britain it has been held they could not."

NEW JERSEY, in *State vs. Trenton*, *supra*, quote from the case of *Milhau vs. Sharp*, and follow it. In that case the Common Council of Trenton, on the 12th March, 1872, passed an Ordinance, the title of which was:

> "An Ordinance to authorize Benjamin Fish and George S. Green, to construct a railroad track across west State street, from the canal to their land at the waste weir."

The Court, in declaring the above Ordinance void, and citing with approval *Milhau vs. Sharp*, reported in 14 Barbour, said:

> "In the same case reported in 17 Barbour, 435, it was decided that the right to make a grant of that nature without the power of revocation was not within the powers conferred upon the Common Council; that it was not a Legislative Act, regulating the use of the street, but a grant of the use itself, to the extent specified, whereby they deprived themselves of absolute control over the street, and became disabled to discharge the important public trust reposed in them."

TENNESSEE, by its Supreme Court, in the case of *Memphis City R. Co. vs. Memphis*, *supra*, followed the New York case in declaring a contract made by the Mayor and Aldermen on November 20, 1859, void, which conferred the right on certain individuals to use the streets of Memphis for a street railway. The Court said:

> "It was held in several well considered cases, that the corporations themselves had no power to confer upon individuals by *contract* the right of constructing and

> operating street railroads on public streets for their own benefit or individual use. * * * The Mayor and Aldermen had no authority therefore to *contract* with Kirk and Small, and their associates, to operate street railroads in the City of Memphis, or to confer upon them the exclusive right. It follows the *contract* of the 20th November, 1859, was void."

MARYLAND. The lengthy quotations heretofore made in this brief from the case of *Lake Roland Elevated R. Co. vs. Baltimore, supra*, renders it unnecessary again to quote at any length from this case. It is only desired now to present in the words of *Judge Bryan* the Court of Appeals' approval of the New York cases. He says:

> "In *Davis vs. New York*, 14 New York, 506, and in *Milhau vs. Sharp*, 27 New York, 611, a grant by the Common Council of New York, authorizing the construction of a Railway in Broadway was held void. The principle of decision in these cases was that a permanent grant of this kind divested the corporation of New York City of the exclusive control over the streets which had been given in trust for the use of the public and which it was not competent to relinquish." (Record, 179.)

Passing now to the consideration of the cases in the Federal Courts where this question has arisen, we will find that the doctrine of the New York cases has been, in these Courts also, fully approved and followed.

U. S. CIRCUIT COURT. Mr. *Justice Brewer*, when a Circuit *Judge*, passed on this identical question in the U. S. Circuit Court for Kansas, in the case of *Jackson Co. Horse R. Co. vs. Interstate Rapid Transit Ry. Co., supra*. The question of the exclusiveness of the grant was also involved, and passed upon. *Judge Brewer* flatly decided against the power of a municipal corporation, under its general powers of control over

the streets, to enter into a contract with a street railway for the use of its streets for railroad purposes, but said it might grant a *permit* which would be in the nature of a *license*, not a *contract*.

His language was:

> "Now, coming closely to the question, the Legislature has not in terms, given to the city the power of granting an exclusive privilege of occupying the streets with railroads; *it has not in terms given to it the right to contract away its continuous control of the streets*, and its future judgment of the needs of the public in those streets, by a surrender of their occupation for railroad purposes to individuals for a series of years. *Indeed, it has not in terms made any specific grant in respect to the occupation of streets by railroads and their operation thereon.*
>
> "Upon what then can it be claimed that the city has the power to give to an individual the right to occupy the streets with railroads, secure him that right for a term of years and also the right of debarring, during such term, every other citizen from a like use of the streets? It was held in the *Atchinson case, supra*, (31 Kan. 660), that the city might *permit* a street railroad, and this because the Legislature had granted to it a *general control and supervision of the streets. In this the current of opinion and authority was followed.* Under such power the city may permit any ordinary use of a street as a street. A street railroad comes within the ordinary use of a street as a street, But power to *permit* one citizen to use the streets in a given way is a very different thing from power to give such citizen the right to keep every other citizen from a like use of the streets. The one is a mere street regulation—a license; the other rises in the dignity of a contract—a franchise. *The one may rest upon the ordinary powers of street management and control, the other requires the support of a special grant.*"

It will be observed that *Judge Brewer* distinctly places his decision upon the two grounds of exclusiveness and the contracting away of the city's continuous control.

It is to be noticed that the charter of the city of Kansas, in the respect under consideration, as stated in the preceding part of the *Judge's* opinion, was exactly as is the charter of the city of Baltimore. As stated by him "*the city was given, by its charter, general supervision and control of the streets, but was not given, in express terms, power to authorize street railroads.*" The New York case of *Davis vs. New York, supra,* is cited with approval and followed. *Judge Brewer,* in concluding his clear and able opinion, again states the doctrine of continuing control of a city over its streets, for which the appellant contends, as follows:

> "It will not do to say that the grant of general supervision and control of the street carries with it by implication, the power to give exclusive privileges; *for the grant implies a vesting in the city of continuous control.* It is no authority for surrendering its control, supervision and management to any other corporation or individual. It implies that the city today, tomorrow and so long as the grant remains, shall exercise its constant judgment as to the needs of the public in the streets, and not that it may today surrender to an individual or a private corporation the right of determining a score of years hence, what the public may then need."

Could there be a more vigorous presentation of the evils which may flow from construing the general powers of municipal corporations to embrace the power of parting with the control of the city's streets?

Another well considered and able opinion on this same question, has been recently, May 31, 1893, delivered by *Judge Taft* of the U. S. Circuit Court of Michigan, in the case of *Detroit vs. Detroit City Ry. Co. supra.* The charter of Detroit in its terms was exactly similar to the charter of Baltimore City. He gives, in his opinion, the charter as empowering the city "*to prescribe, control and regulate the manner in which the highways, streets, avenues, &c., shall be used and enjoyed.*"

Judge Taft devotes a large part of his opinion to the discussion of this question, this being only one of the questions in the case. He reviews most of the authorities relating to the question, and although he seems to have overlooked the able opinions of *Chief Judge Alvey* and *Judge Bryan* in the case of *Lake Roland Elevated R. Co. Case, supra*, delivered March and April 1893, yet his reasoning on the question is similar to these *Judges*, and his conclusions of law as to the powers of municipal corporations in the respect under consideration is identical with the Maryland Judges. Among other statements in the opinion of *Judge Taft* on this question are the following:

> "It would seem to follow that under the general power to regulate the use of the streets, the City Council might *permit* or *license* a street railway company, if it has the requisite franchise from the State to lay its tracks in the streets and to run its cars thereon. But this would only be in the exercise by the Council of legislative power. * * * It necessarily follows, having regard to the strict rule of construction already discussed, that while, under its legislative power of regulating the use of the streets, the Council may *permit* a railway to be laid in the streets, it can not, by virtue of that power, *agree* that such a use shall continue for thirty years. This is the exercise, not of a legislative, but of a *contractual* power. It is an abridgment of the legislative power by contract. It is the grant of a *vested right* in the streets to the railway company, whereby for thirty years, it shall have a private ownership in tracks *in situ*, and the exclusive right to run cars over them. * * * The right of a City Council, under its general control of the streets, to grant an irrevocable easement for the laying of tracks and running of cars, has several times been considered by Courts of last resort in this country; and the great weight of authority is in favor of the view *that such power does not include authority to convey a vested right in the streets for years or in perpetuity.*"

The Judge in his opinion discusses both of the New York cases, and expresses his full endorsement of both of them.

There was another question in this case, which was a contention set up by the street railway company, that although the City of ~~Kansas~~ Detroit in its charter might not be empowered to enter into the contract in question, yet the tram way act which was a part of the street railway's charter did empower both the city and railway company to enter into contractual relations as to the use of the streets for street railway purposes. *Judge Taft* decided this point also against the contention of the street railway, but on appeal, as will be seen, to the U. S. Circuit Court of Appeals, for the Sixth Circuit, he was reversed on this point. The upper Court, without deciding, yet agreed with *Judge Taft* on the question that under the general power of control over its streets, the city had no power to enter into a contract with a street railway for the use of its streets for street railway purposes.

U. S. CIRCUIT COURT OF APPEALS.—*Detriot Citizens' St. Ry. Co. vs. Detroit, supra*, is the above case on appeal to the U. S. Circuit Court of Appeals, for the Sixth Circuit. *Judge Lurton*, who delivered the opinion of the Court, on this question, said:

> "That a revocable license would be within the general charter powers of the city is distinctly supported by the opinion of *Judge Taft*, now under review. *Whether such general powers will authorize a consent in perpetuity, or for a definite term, is doubtful.* The weight of authority seems to be that any grant of an easement for a definite time, operates as an abridgment of the legislative power of control over the streets, and would not be an exercise of the legislative power conferred by the charter. This view is strongly supported by the New York authorities *as well as many others. Davis vs. New York*, 14 N. Y. 506; *Milhau vs. Sharp*, 27 N. Y. 611; *New York vs. Second Ave. R. Co.*, 32 N. Y. 261, 273. These cases seem to proceed upon the theory that the grant of any easement in the streets is the conveyance of a property interest, commensurate with the purpose for which it is to be used, and therefore irrevocable, unless that power is reserved."

On November 11, 1895, a writ of *certiorari* was refused in this case by this Court. 163 U. S. 683.

SUPREME COURT OF THE U. S. There is but a single case in this Court which has been found, in which the law as laid down in the two New York cases has been referred to, approved and followed, this is the case of *People Passenger R. Co. vs. Memphis City R. Co., supra.*

The question directly before the Court in that case, was the power of a municipal corporation under its general powers to confer a street railway franchise on an association of individuals; but in the Court's opinion on this question, it will be seen, in its reference to the New York cases, that it fully approved them in all respects. Mr. *Justice Clifford* in delivering the opinion of the Court, after referring to certain special provisions in the charter of Memphis, which were claimed to empower the city to enter into the contract in question with the street railways; says:

> "Independently of those provisions, it is quite clear that the municipal authorities of the city possessed no such power as is supposed by these respondents. Such corporations are usually invested with the power to lay out, open, alter, repair and amend streets within the corporate limits; but the rule is well settled that by virtue of these powers, without more, they cannot grant to an association of persons the right to construct and maintain for a term of years a railway in one of its streets of the municipality for the transportation of passengers for private gain, and that an Ordinance or Resolution of the authorities granting such right, is void, *Davis vs. Mayor N. Y.* 14 N. Y. 514. Special powers are given to such corporations to lay out, open and repair streets as a trust to be held and exercised for the benefit of the public from time to time as occasion may require, and the general rule is, that those powers cannot be delegated to others, *nor be effectually abridged by any act of the municipal corporation, without the express authority of the Legislature. Milhau vs. Sharp* 27 N. Y. 611.

It is respectfully submitted that this Court, through Mr. *Justice Clifford*, in the above case, has given its approval to the doctrine of the New York cases.

In concluding this division of the brief, the appellant submits that upon both principle, reason and authority, its contention as to the limitation of the powers of the City of Baltimore over its streets, in the respect under consideration, is not only by the highest Court of Maryland, but by the weight of authority elsewhere, fully sustained; and if so, Ordinance No. 1 was a valid exercise of the city's power of control over Lexington street, and does not violate the Federal Constitution.

3. The fact that a municipal corporation has the power of revocation of a permit or license to use its streets by street railways, it is claimed will deter investors and impair the ability of new companies to float their bonds and destroy property rights in old ones; if true, this is no answer to the question of whether the power exists; if it be an unwise power to lodge in a municipal corporation, the Legislature can abridge it by enlarging municipal corporate power so that cities may be empowered to make a valid contract in that respect with street railway companies.

Chief Judge Alvey answers fully this complaint in the *Lake Roland Elevated Ry. Co. case, supra.* He says:

> "I am aware that it may be urged—and indeed it has been urged here, and it constitutes the full strength of appellant's case—that upon the principles that I have stated as the grounds of my judgment, there would be no sufficient protection to the property rights in a street railway. But I am far from saying that such property rights are not entitled to protection. If, in reliance upon a valid Ordinance, a railway company in good faith and without notice that the authority is about to be modified or withdrawn, has laid tracks in the street of a city, and the municipal authorities afterwards con-

> clude that the grant of the privilege was improvident or detrimental to the public and require the tracks to be removed, this can be enforced only upon principles of fair indemnity to the company. This, in accordance with a well established principle in the case of an executed license, where to entitle the licensor to revoke the license and to be restored to his former rights, he must do justice to the licensee by indemnifying him for the expense which he has reasonably incurred under the license, but not for prospective profits that might be realized. This measure of indemnity the principles of justice would seem to require in such case, as I have just stated. See *Addison vs. Hack*, 2 Gill, 221." (Record, 190, and Appendix.)

In the *Jackson Co. Horse R. Co. vs. Interstate Rapid T. Ry. Co., supra, Judge Brewer* meets this same question in the following language.

> "It is doubtless true, as counsel say, that capital is timid, and will not undertake such enterprises without abundant guarantees and undoubted security. But this suggests matters of policy and presents considerations for the Legislature. It does not aid in determining what powers have been granted, or in construction of charters or ordinances."

In *Detroit vs. Detroit City Ry. Co., supra, Judge Taft* was also met by this same objection as to the results which would follow this power of revocation. His answer was:

> "But it is said that the investment required would render it impossible to build a street railway, if the right to continue its use were dependent on a revocable license. That may be true, and it is a good reason why one Council should be given the right to abridge the legislative power of another by contract and grant; but it furnishes no ground for saying, in the absence of such legislative authority, *that a right to legislate is a right to contract.*"

The fact is that any street railway company may at any time be deprived by the Legislature which created

it, where the reserved power of repeal is retained, not only of its rights to use the streets of the city, but its franchise, and have left to it nothing but its cars, tracks and plant. (*Greenwood vs. Freight Co.*, 105 U. S. 13.)

If the State can do this, and destroy the security of investors so far as the franchise and use of the streets are concerned, why need there be so much fear of exactly the same power being exercised in the agent of the State, the muncipal corporation under its power of revocation? Both or either, the repeal or revocation, would require a legislative Act passed in due form, with the usual safeguards against hasty and oppressive legislation, and only in cases where the public necessities required, would such action be taken.

II.

Thirteenth Assignment of Errors.

Ordinance No. 1 is a valid exercise of the POLICE POWER of the City of Baltimore over its streets, and does not impair the obligation of a contract, and is not in violation of section 10 of Article 1 of the Constitution of the United States.

Under the succeeding divisions of this brief, it will be assumed that Ordinance No. 23 did create a valid contract between the appellant and the North Avenue Company and hence with the Lake Roland Company, and the contention of the appellant will be that as part of that contract, as much so as if expressed in terms, and written in it, is the power reserved to the appellant, over its streets or highways, when the safety of the citizens of Baltimore or the public welfare and convenience require, under what is known as its *police power*, to substitute one track for two tracks on the portion of Lexington street described in Ordinance No. 1. The contention of the appellant on this point is best put in the exact words of the *Thirteenth Assignment of Error*, which is as follows:

"*Thirteenth.* There was error in the Court's finding and decreeing that Ordinance No. 1, approved November 18th, 1892, was in violation of the tenth section of the first article of the Constitution of the United States and was therefore void, because the amendment of section 1 of Ordinance No. 23, approved April 8th, 1891, by Ordinance No. 1, as appears from the terms and language of said Ordinance No. 1, and the pleadings, evidence, and exhibits in this cause was the reasonable exercise by the legislative department of Baltimore city of the police power delegated to it to protect the public safety, welfare, and convenience from the danger and inconvenience of railway cars passing on two tracks in opposite directions at same time, at intervals of one and one-half minutes, propelled by electricity at the speed of ten miles an hour over one of its crowded public streets or highways in the centre of said city, which street was too narrow to permit vehicles which used said street of certain width to stop on said street outside of said tracks, or to pass cars standing or passing on said tracks, and which was the only driveway unobstructed by railway tracks between the eastern and western limits of said city, by an amendment to Ordinance No. 23, which substituted for the distance of 1,100 feet, or three squares, of a route of double railway tracks of several miles in length through the streets of the city, with two southern termini in centre of city a few squares apart, of one railway track and switch for two railway tracks for said distance of 1,100 feet, or three squares, which exercise of said police power by said city by Ordinance No. 1, to protect the public safety and welfare, as aforesaid, by amendment or regulation of the license, privilege, grant, or contract given by Ordinance No. 23, was not a violation of section ten of Article 1 of the Constitution of the United States and void."

A. It will be found upon examination of the record, that the above statement of facts contained in the thirteenth assignment of errors, as to the condition of the portion of Lexington street in question, and the public demands of convenience and safety for one track theron, are in every respect true. Considering this statement in the order of averment, it will be found:

1. That Ordinance No. 1 expressly avers in its preamble that the public necessity demands one track. This preamble is as follows:

> "Whereas it appears to the Mayor and City Council of Baltimore, that the *public safety and convenience*, and the proper regulation of the use of the streets require that there should not be more than one iron railway track laid down, constructed, maintained or used on said portion of Lexington street." (Record, 30 and Appendix.)

2. The Mayor of Baltimore, as its chief magistrate and executive head, in compliance with his duty to advise the legislative department of the municipal government of the necessity for legislation to protect the public safety and welfare, had prepared and sent to the City Council this Ordinance No. 1, and accompanied it with a special message in which he states:

> "I am in favor of rapid transit and believe that the change in motive power to the cable and electricity will greatly benefit this community. At the same time, I think that some consideration should be given to the rights and privileges of those who use the streets with horse vehicles; in other words, that only single tracks should be laid on those business thoroughfares which are not of sufficient width to accommodate double tracks without greatly inconveniencing the public. In other cities, where the thoroughfares are narrow, the railroads are compelled to use parallel streets for their up and down traffic. After paying nearly six thousand dollars to open Douglas street, (an extension of Lexington street,) as an east and west thoroughfare, we find that three squares of the street, that is, from North to Charles will be almost blockaded by the double tracks of this railroad company. This matter, in my judgment, demands the immediate attention and consideration of this honorable body." (Record, 100 and Appendix.)

3. The testimony of sundry witnesses in the record show conclusively the necessity of one track on Lexington street.

James H. Smith, a member of the bar, and also of the City Council, which passed Ordinance No. 1, is asked this question:

> "9 Q, Will you tell the examiner whether or not you consider a double track system of tracks, laid as these tracks are on Lexington street, a detriment or otherwise to the public travel on this street.
>
> "A. Yes, sir; I consider that a double track there, with the cars running at short intervals, *would practically drive all other travel off the street, surrendering the street to railroad travel.*" (Record, 152.)

The following gentlemen, viz: J. Alex. Preston, Robert Ludlow Preston, Alexander Preston, J. W. Bryant, A. Milholland, Frederick Leist, Percy C. Hennighausen, L. P. Hennighausen, Frank Gosnell, J. Denmead, Jacob H. Mitnick, Emil Budnitz, C. D. McFarland, James W. Bowers, Jr., Richard M. Duvall, Maurice Gregg, E. Beatty Graff, Oscar Wolff and George T. R. Lewis, members of the bar, who occupy offices on the portion of Lexington street in question, signed the following certificate, to have by agreement the same effect as if testified to in due form:

> "We the undsrsigned, hereby certify that in our opinion the construction and maintaining of two railway tracks on Lexington street between Charles street and North street would be an *inconvenience to the public by interfering with the facilities for travel thereon*, and detrimental to the property bounded thereon." (Record, 221-222.)

The testimony of R. Keith Compton, (Record, 147-148,) who made the measurements of the distances between the gutter stone and the overhang of the cars taken in connection with the maps, (Record, 176,) and the different widths of the vehicles made by same wit-

ness, show that there is not sufficient distance between the gutter stone and side of a passing car, for a vehicle to pass or stand without the greatest danger of collision between the two. The wheel of the vehicle would have to be run up the slant from curb to gutter stone with hub projecting over payment in order, in many cases, to get room enough in inches for the two to pass.

4. The news items and editorial of the *Baltimore Sun*, (Record, 171, 172, 220, and Appendix,) also show that the public requirements and sentiment demanded but one track on Lexington street, between North and Charles streets.

5. The *speed* at which the cars are permitted by Ordinance No. 23 to run on the portion of Lexington street in question, and the short intervals proposed by the schedule to be adopted as averred in the answer of the Lake Roland Company in the case in the Court of Appeals of Maryland, and a part of the record in this case, both render the occupation of Lexington street, with two tracks, and cars passing and repassing on the same dangerous and inconvenient to the general public.

Ordinance No. 23 in its section 7, as to the speed allowed, provides:

> "And provided further, that the cars of the said company shall not travel upon the streets of the city upon any part of the tracks lying east of Pennsylvania avenue at a greater rate of speed than ten miles an hour, exclusive of stoppage." (Record, 63 and Appendix.)

The answer of the Lake Roland Company in the case in the State Court, as to the intervals of running of its cars on the portion of Lexington street in question, contained this following averment:

> "Its cars will be propelled by electricity at a *high rate of speed*, and in the morning and evening when

travel becomes congested and great number of cars are coming in and going out over the two branches of your orator's road, it will become necessary *to run cars on Lexington street at intervals of three or two minutes, and sometimes at the intervals of one minute apart.*" (Record, 72.)

6. The condition of Lexington street, and its destruction as a highway by two tracks on which were to be run cars at the *high rate of speed* of ten miles an hour, and sometimes at intervals of one minute apart, was forcibly presented by *Judge Bryan* in the State Court case, which portion of his opinion is printed in this brief under the head of the "*Statement of the Case*," (Brief, page 4,) and need not be again repeated.

Judge Morris of the U. S. Circuit Court, in his dissenting opinion in this case gives equally as forcible a presentation of the consequences of two tracks on Lexington street. A street which this learned Judge passes over daily in going and coming from his residence to the U. S. Court rooms. He says:

"The portion of Lexington street on which the railroad company is restricted to one track, consists of three short blocks in the *heart of the city*, where the street is of a *steep grade, and is less than the usual width, and where it passes some of the principal public buildings.* There is shown by the proofs to have been diversity of opinion among the property owners on the street as to the *danger, inconvenience* and *obstruction* resulting from double tracks, but enough appears to show that the position taken by the city officials and by the City Council has strong support, and that it is a case in which it cannot be said that the action of the City Council was wanton and in bad faith. With the strong presumption in favor of the reasonableness of the Ordinance, I cannot see how, upon the testimony, it can be declared to be unreasonable and oppressive. Cases may be found in which courts have held, with regard to horse railroads in cities, that it was not a justifiable withdrawal of a valid grant to reduce the railroad to one track, but the special circumstances must control. An electric railroad in its speed,

in the weight and momentum of its cars, in the danger to persons on foot and in vehicles, (especially when running on frequented and narrow streets,) approximates the danger of steam locomotives rather than that of horse cars, and the duty of the city with regard to them is more stringent in proportion to the greater danger.

"If the city had ordained that the public safety required that but one car at a time should be allowed on Lexington street hill, so that there never should be both one ascending and one descending, it would be difficult to maintain that such an ordinance was not a proper exercise of the power to regulate the use of the street. The restriction to one track accomplishes the same result, with the advantage that the track is in the middle of the street.

"In my judgment the restriction to the use of one track, under the circumstances, is an exercise of a governmental power which the city never parted with, and subject to which the North-Avenue Ordinance was accepted by the railroad company." (Record, 235.)

Upon these facts as presented in the record and the opinions of the two Judges, who knew personally, as well as judicially, the locality in question, it cannot be doubted, that the substitution of one track for two on Lexington street, by Ordinance No. 1, was the performance of a public duty by the appellant which it owed to its citizens and but the proper exercise of its police power over a subject falling distinctly under this power.

B. The appellant has had conferred upon it by its charter the whole police power of the State in so far as it relates to persons and property within its corporate limits. The charter provides:

"The Mayor and City Council may pass Ordinances for preserving order, securing property and persons from violence, *danger* or destruction, protecting the public and city property, rights and privileges from waste, encroachment, *and for promoting the great*

interests and insuring the good government of the city."

Code Local Laws, Art. 4, Sec. 721.

"All the streets, lanes or alleys opened in the manner directed in the preceding sections shall be public highways, and be subject to the laws, regulations and ordinances applicable to public streets, lanes or alleys, or parts thereof in said city."

Ibid. sec. 806.

C. The exercise of the reserved governmental power by the State, known as the police power, over persons and property within its limits, is broad and plenary. The safety and welfare of the public in the use of the public highways are universally recognized as subjects over which the police power of the State extends, and which at all times may be exercised, as much so as over the morals and health of the public. The rightful exercise of this power over subjects within its domain, is never held as impairing the obligation of a contract. By implication the law creating a corporation carries the right to exercise this governmental power whenever the State deems it necessary for the public safety or welfare, into every charter, franchise, or grant. As well stated by an eminent writer, "All property," says Mr. Justice Story, " is held subject to those general regulations which are necessary for the common good and general welfare." And the Legislature has the power " to define the mode and manner in which every one may" use his property. 2 Story, Const. 701. The law of the police power may be said to rest upon the maxim of "*salus populi suprema lex*," and the Constitutional guaranties for the security of private rights have never been understood as interfering with the power of the State to pass such laws as may be necessary to protect the health and provide for the safety of the public. No Court in any land has been more pronounced than this in upholding this power which, as has been so often said by it,

is reserved to the States. The rightful exercise of which power, over subjects falling within the class subject to its exercise, as repeatedly held by this Court, can never be said to violate the Federal Constitution or any valid law of the United States.

In Barbier vs. Connolly, 113 U. S. 27, it was said by this Court, in sustaining an Ordinance of the city of San Francisco, relating to the closing of laundries between 10 P. M. and 6 A. M., speaking through Mr. *Justice Field:*

> "But neither the amendment (14th), broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its '*police power*,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

This Court in another case said:

> "The police power of a State is as broad and plenary as its taxing power, and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter."
>
> *Kidd vs. Pearson*, 128 U. S. 1.

And in the case of *Mugler vs. Kansas*, 123 U. S. 623, after considering the constitutional limitation which declares no person shall be deprived of his property or liberty without due process of law, this Court says, this limitation:

> "Has never been regarded as incompatible with the principle, equally vital, because so essential to the peace and *safety* of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

The exercise of this power by the State and city over the streets of the city of New York, requiring all telegraph and telephone companies in operation in that city to remove its wires and poles and place their wires in subways or conduits constructed by the city, was before the Court of Appeals of New York on complaint of the companies, that the law (Subway Act, 1885 and 1886,) requiring their removal, violated the Federal Constitution. The New York Court of Appeals, among other reasons, held the right to remove these poles and wires from the public highways was derived from the police power possessed by the State, and on writ of error from this Court, the decision of the New York Court as to the right being derived from the police power, was expressly approved and affirmed by this Court.

People vs. Squire, 107 N. Y. 593, 603, 604, is the case referred to above, and in the opinion on this question, the Court of Appeals of New York said:

> "The right to exercise the (police) power cannot be alienated, surrendered or abridged by the Legislature by any *grant*, *contract* or *legislation whatever*; because its constitutes the exercise of a govermental function, without which it would become powerless to protect the rights which it was expressly designed to accomplish."

This Court, in *New York vs. Squire*, 145 U. S. 191, it being the same case as the one above, on writ of error to the New York Court, said:

> "Independently, however, of the contractual relations of the relator, the statute of 1885 and 1886, (subway act,) are so clearly an exercise of the general police powers of the State that we do not deem it necessary to add anything on that point to what was said by the Court of Appeals of New York. 107 N. Y. 593, 603 and 604."

If then, it were true that it was lawful for the City of New York, under the police power, to cut down the

poles and remove the wires of all telegraph and telephone companies located in its streets, and force them to occupy subways built by the city, notwithstanding the previous grants to them by the State and City to use the streets with their poles and wires; can it be doubted that under a similar power the appellant can compel the Lake Roland Company to substitute for two tracks one track in a narrow street in the centre of the city, on a steep grade, for the distance of 1,100 feet, when travel by vehicles would be destroyed or seriously disturbed, by two tracks and cars passing on them at intervals of sometimes one minute, and at the speed of ten miles an hour?

The question of the reserved power of the States, known as the police power, over a certain class of subjects and objects, such as public safety, health and morals, and especially over all highways and streets, has been a prolific source of discussion, definition and adjudication, and this Court has, in a number of cases, passed on most of these questions. Its more recent cases, beginning with the famous *Slaughter House Cases*, 6 Wall. 36, and ending with *Harrington vs. Georgia*, 163 U. S. 299. It is not the purpose of the appellant in this brief to discuss these cases, but simply to suggest to the Court that there is no case on this question decided by this Court, which in the least impairs the correctness of the appellant's contention, that the police power of the appellant over the streets of Baltimore City, justified the passage of Ordinance No. 1.

The power of control of the streets of cities under the police power has been a subject of frequent consideration and adjudication by the State Courts, and as will be seen, the exact question here, has arisen and has been decided in favor of the appellant's contention, in Missouri Kentucky and Michigan. The Courts in those States have decided that under the police power, a city may require a railroad company to maintain but a single

track instead of two, in the streets, when the public convenience and safety require. Questions similar in principle to the removal of tracks have been also decided by a number of Courts; and it has never been doubted that this reserved power of the States was a legal justification for the exercise of its absolute control over its highways and streets, when the public safety required it.

MISSOURI. In the case of *Dubach vs. Railroad Co.*, 89 Mo. 483, 11 S. W. Rep. 86, the Supreme Court of Missouri, by *Judge Henry*, said on this question:

> "If the character of a street should be such that the defendant's tracks could not be laid upon the street without *hindering the public from using it*, then no matter how important to the company that its tracks should be laid in that street, *it could not be done.*"

In *Lockwood vs. Railroad Co.*, 122 Mo. 86, 26 S. W. Rep. 698, the above case has recently had full approval and affirmance by the Supreme Court of Missouri. The case was one in which a similar question arose on a like state of facts, and the Court in its opinion quotes the above extract from the opinion of *Judge Henry*, in 89 Mo. 483.

KENTUCKY. The Court of Appeals of Kentucky, in *Commonwealth vs. City of Frankfort*, 92 Ky. 149, 17 S. W. Rep. 287, said, as to the use of the streets of the city of Frankfort by the tracks of a railroad company which obstructed the use of the street by the public:

> "But the public are entitled to the reasonable use of the public streets and alleys for their ordinary travel; but where the grantee of the privilege is empowered to use the privilege when he pleases and as often as he pleases, and every time he uses it such use totally obstructs for the time being, though not long at a time, the ordinary travel along the street or alley, *the grant in such case is unauthorized.*"

The application of the principle of law of the above case to the case at bar, demonstrates the correctness of the contention of the appellant. Assume that the average width of the vehicles which are accustomed to use the portion of Lexington street, between Charles and Calvert streets, two of the squares in question, was *five feet six inches*, from hub to hub, which, in many cases of vehicles, would be less than the fact, then, as stated by *Judge Bryan* in his opinion, and fully sustained by the record: "*By measurement it is shown that the distance between the overhanging sides of the cars and gutter on the south side of Lexington street, between Charles and Calvert, will vary from four feet seven inches to three feet eight inches, and on the north side it varies from four feet seven inches to three feet four inches,*" the Court is respectfully asked upon such a state of facts: If it is possible for a vehicle and a car to pass each other on that portion of Lexington street? It will not do for the appellee to say if the driver runs his wheel up the slant of the gutter from curb to gutter stone and lets the hub partly project over the pavement, he will get more room and they can pass. The appellant submits that the record shows that they could not then pass; but if they could, there is no obligation on the part of the public who use this street with vehicles, to do any such thing.

Again, this obstruction on Lexington street, resulting from two tracks, is to occur *every three or two minutes and sometimes every minute* in the day, as it is contemplated to run the cars at intervals of this space of time, as stated in the bill of complaint filed in the State Court case and a part of this record, and at ten miles an hour down a steep grade.

Argument or suggestion is not necessary to satisfy the Court that two tracks on Lexington street must result is an abandonment of that highway to the use of this street railway company.

MICHIGAN. The Supreme Court of Michigan had the same question before it. In *Grand Rapids St. R. Co. vs. West Side St. R. Co.*, 48 Mich., 433, 12 N. W. Rep., 643, the Court said:

> "That body (Council of Grand Rapids) certainly cannot properly so multiply tracks as to interfere with the rights of the general public in the street."

And in *Detroit City R. Co. vs. Mills*, 85 Mich., 634, 48 N. W. Rep., 1007, the same Court said:

> "Under this record we can only announce some general principles, leaving the defendants, without prejudice, to pursue such remedy as they may have when they can establish a violation of their legal rights: (1.) The complainant cannot lawfully construct and operate its road *in a street too narrow to admit the passage of its cars and other vehicles at the same time, nor to construct it as to interfere with the rights of the general public.*"

NEW YORK. In *American Rapid Telegraph Co. vs. Hess*, 125 N. Y. 641, 26 N. E. Rep. 919, the question arose and was decided in favor of the power, upon the following facts, whether, after a grant by the State to certain telegraph companies, of the privilege of using the streets of New York for their wires and poles, they could be required by a subsequent Act to remove them and to place their wires in subways built by the city.

The Court in that case, in holding that they could be so required, said:

> "The people of the State do not own the streets, and the only authority the Legislature has over them is to deal with them as streets, and to regulate their use as streets for public purposes, and by these Acts, (prior ones granting the use) it in effect determined that one of these purposes for which the street could be used was the erection of poles and stringing of wires for the business of telegraphy, and that that was a public

> use, not inconsistent with the use of the street for general street purposes. *These were general public legislative Acts in the exercise of the police power of the State, and, therefore, they were not beyond the reach or touch of future legislation. The Legislature did not intend to divest itself, and could not divest itself of its control over the streets for the public welfare,* and we must infer from the language used that it did not intend to bind itself by an irrevocable grant. If, therefore, these Acts are to be construed as *merely conferring a license* which had been acted upon by the plaintiffs, the Legislature could revoke the license or modify it, in any way, or at any time, when public interest might require it."

In closing this division of the brief it may be proper to suggest to the Court the rule which it has often announced as the rule of law to govern cases where the constitutionality of a statute is sought to be upheld on the one side by a claim, that it was passed in the exercise of the reserved police power of the State, and on the other hand it is claimed to impair the obligation of a contract, and therefore violate the Federal Constitution. In the recent case of *Hennington vs. Georgia,* 163 U. S., 299, 304, this Court has briefly, yet clearly and forcibly, stated this rule to be:

> "The well settled rule is, that if a statute purporting to have been enacted to protect the public health, the public morals, *or the public safety,* has no *real or substantial* relation to these objects, or is a *palpable invasion* of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution."

It is respectfully submitted that under this rule there cannot be a doubt as to whether or not this appellant is right in his contention that Ordinance No. 1 is a valid exercise of its police power over its streets, and not a violation of the Federal Constitution.

Streets and highways are distinctively a subject or object over which the police power is continually and

lawfully exercised for the protection of the rights, welfare and safety of the general public. With the facts which appear in this Record and found in their opinions as quoted in the brief, of both the State and Federal Judges of the lower Courts, and the result to the public of two tracks on Lexington street, as shown by the exhibits and testimony in the Record, can it be said that Ordinance No. 1 has no "*real and substantial relation to the object?*" Or that under the well recognized principle of law that all grants of privileges in the streets or highways must at all times be subject to the governmental control of the grantor when the public safety requires, and that this reservation is as binding on the grantee as if it were expressed in the grant, can it be said that Ordinance No. 1 is "*a palpable invasion of rights secured by the fundamental law?*"

III.

Fourteenth Assignment of Errors.

Ordinance No. 1 is a valid exercise of the RESERVED POWER OF AMENDMENT of Ordinance No. 23, reserved to the appellant by the Act of 1892, chapter 112, and does not impair the obligation of a contract, and is not in violation of section 10 of the Constitution of the United States.

The Act of 1892, chapter 112, (Appendix) was the Act passed by the General Assembly of Maryland, when it became necessary to obtain the ratification of Ordinance No. 23 by the Legislature, because of the elevated structure provided for in Ordinance No. 23, on a part of the route of the North Avenue Company, and which the appellant, under section 186 of Article 23, Public General Laws, had no power to license or permit.

The provision in the Act of 1892, chapter 112, reserving this power of amendment and repeal of Ordinance No. 23 to the appellant, is as follows:

> "The said Mayor and City Council to have the same power and control *hereafter* in reference to the enforcement, *amendment or repeal*, of said Ordinance as it has or would have in respect to *any* Ordinance passed under its general powers." (Appendix.)

What does this reservation mean? The appellee's contention in effect is, that it is meaningless and has no substantial force or effect.

The appellant contends that it confers upon the legislative department of Baltimore the absolute right, whether it existed before or not is immaterial, of amendment or repeal of every provision in Ordinance No. 23; not the repeal of the franchise or capacity of the North Avenue or its successor to be a street railway in Baltimore city, because that comes from the State; but the appellant can by repeal or amendment of Ordinance No. 23, deprive the North Avenue Company or the Lake Roland Company of the right to use all or any of the streets named in Ordinance No. 23, for street railway purposes.

Is the appellant right in this broad claim as to the effect of the repealing clause in the Act of 1892, chapter 112? This important inquiry will now be considered.

A. *The Lake Roland Company as the successor of the North Avenue Company, has no vested right either in its capacity to be or franchise of a street railway company in Baltimore city, conferred by the State, nor in the use of a single street for street railway purposes, conferred by Ordinance No. 23, which the Legislature of Maryland could not at its pleasure revoke or repeal.*

The reserved power of repeal of all charters in the Maryland State Constitution of 1867, is as follows:

> "All charters granted or adopted in pursuance of this section, and all charters heretofore granted and created

subject to repeal or modification, may be altered from time to time or be repealed."

Maryland State Constitution 1867, Art. 3, Sec. 48.

Under this reservation in the Constitution of the State, it will not be denied that the General Assembly of Maryland could have repealed the franchise of being a street railway, conferred on the Lake Roland Company by its charter, which would have at once deprived the Lake Roland Company of the right to run its cars on a single track named in Ordinance No. 23; or the General Assembly may have left the naked franchise of a street railway to the company and prohibited it from using any of the streets of the city of Baltimore. Neither will it be denied that notwithstanding the grants to the city of Baltimore by the State, of control and regulation of its streets, this grant at any time could be revoked and the State assume exclusive control of the streets or highways within the limits of the city of Baltimore.

This Court has often declared what under this reserve power could be revoked or repealed by the State.

In *Tomlinson vs. Jessup*, 15 Wall. 459, this Court, by Mr. *Justice Field*, gave the class of things which could be reached by a repeal of a charter of a corporation under this reserve power, as follows:

> "The reservation affects the entire relation between the State and the corporation, and places under legislative control *all rights, privileges and immunities derived by its charter directly from the State.*"

In *Sinking Fund Cases*, 9 Otto, 700, Mr. *Chief Justice Waite* quotes the above portion of Mr. *Justice Field's* opinion, and says:

> "Mr. Justice Field, also speaking for the Court, was even more explicit when in Tomlinson vs. Jessup, 15 Wall. 459, he said: 'The reservation affects the entire

> relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State;' and again, as late as R. R. Co. vs. Maine, 96 U. S. 510: 'By the reservation * * * the State retained the power to alter it (charter) in all particulars constituting the grant to the new company formed under it, of corporate rights, privileges and immunities.'"

The exact question now under consideration as to the power of the State to repeal the charter of a railroad company and thereby deprive it of its franchise and the right to use the streets of a city, leaving the company only the old iron of its tracks, cars, &c., has been decided by this Court, and the power under the reservation to the extent above named has been fully sustained.

The case was that of *Greenwood vs. Freight R. Co.*, 105 U. S., 13, and the facts of the case were as follows: A railroad company named the Marginal Company, under its charter had granted to it by the Legislature of Massachusetts the use of certain streets in Boston for its tracks. This company, under its charter, had constructed its road and was operating it on these streets. The Legislature of Massachusetts, under a reservation almost exactly similar in terms to that contained in the Maryland Constitution, Article 3, Section 48, *supra*, repealed its charter and incorporated the Union Company, to which was granted the right to use the same streets, then in actual use by the Marginal Company; and the Act also provided that within four months the Union Company should *take the tracks* of the Marginal Company by condemnation proceedings. A stockholder of the Marginal Company resisted the enforcement of the Act, claiming "*that the two* (taking tracks and deprivation of the use of the streets) *taken together constitute a transfer of the property of the one corporation to the other, and with it all the corporate franchises, rights and powers belonging to the elder corporation.*" The Court rejected this claim and

held, as to the use of the streets, that the Marginal Company had in them no vested rights. That the law which deprived the one of the use of the streets and gave it to the other, was lawful, and that the Courts could not pass upon the propriety of the action of the Legislature. The Court in this case, by *Mr. Justice Miller*, said:

> "It results from this view of the subject that, whatever right remained in the Marginal Company to its rolling stock, its horses, its harness, its stable, the debts due to it and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to incumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in the defendant only by virtue of the repealed charter."

In another case the power of the Legislature to compel railroads to unite in building a Union passenger station and to extend their tracks thereto, and thereafter to discontinue a portion of their existing location, arose in Massachusetts, and was sustained in *Worcester vs. Railroad Co.* 109, Mass. 103.

This Court, in referring and approving of that case and speaking of it as an "*authoritative adjudication*," said through Mr. *Justice Swayne*, in *Shields vs. Ohio*, 95 U. S. 221:

> "In Worcester vs. R. R. Co., 109 Mass. 103, the Legislature had passed an Act requiring the railroad companies therein named to unite in a passenger station in the City of Worcester (the place to be fixed as provided), to extend their tracks in the city to the Union Station, and after the extension, to discontinue parts of their existing location. The Act was held to be constitutional and valid, *being a reasonable exercise of the right reserved to the Legislature to amend, alter or repeal the charters of these companies.*"

It is therefore respectfully submitted that upon the strength of these decisions by this Court, that there can

be no doubt that not only the franchise, but the whole of Ordinance No. 23 may be repealed by the General Assembly of Maryland. There is no vested right in the use of the streets under Ordinance No. 23, which is protected from the operation of the reserved power in the State Constitution. This being so, our next proposition is that—

B. *Under the reservation contained in the Act of* 1892, *chapter* 112, *the Legislative department of the appellant had reserved to it the same power of repeal as to the use of the streets as was possessed by the General Assembly of Maryland under the Constitutional reservation, and can repeal or amend any part of Ordinance No. 23.*

If this proposition is not true, and a vested right in the use of the streets is created by Ordinance No. 23, beyond the reach of the appellant, why, as a *vested right* is it not equally beyond the reach of the State?

Mr. Justice Jackson, when a Circuit Judge, presented the dilemma which such a position must occasion if the converse of the above proposition is law. The case was that of *Grand Rapids, &c. Co. vs. Grand Rapids, &c. Co.* 33 Fed. Rep. 672. The power of repeal or amendment of the Ordinance as here, was in that case reserved to the City Council by Statute. *Judge Jackson* said:

> "Article 15, section 1, of State Constitution, provides, that, 'corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. *All laws passed pursuant to this section may be amended, altered or repealed.*' Now by the Ordinance 1880, if valid, the complainant, a corporation organized under the laws of the State, has secured not only an exclusive franchise belonging to the State, but an *irrepealable privilege* such as the legislature could not have conferred. Is it to be presumed that the legislature, under its constitutional authority 'to confer upon incorporated cities such powers of a local legislative and administrative character as they may deem proper,' in-

tended to invest the Common Council of Grand Rapids with the power to grant irrepealable franchises in or over the streets of that city and thereby confer upon the grantees privileges or franchises not subject to alteration, amendment or repeal—rights which the legislature itself could not have directly conferred? If such a presumption is proper, the conclusion is reached that the agencies or creatures of the State may, in the exercise of derivative and delegated powers do what the legislature itself could not. *This would violate the well settled rule that the Legislature can not do indirectly, through the local government what the people have by their Constitution restricted it in doing directly. 1 Dillon, Mun. Corp.* sec, 329 (4th Ed.)"

If we read the reservation in the Act of 1892, chapter 112, in the light of this wise principle of law, as announced by the late *Mr. Justice Jackson*, can there be a doubt that the General Assembly of Maryland intended by the reservation in the Act of 1892 to avoid and prevent the very absurd consequences suggested by this eminent Judge and Jurist? Mr. Dillon, in the reference given in his opinion, said a municipal corporation could not "adopt by-laws which infringed the spirit or are repugnant to the policy of the State as declared in its general legislation." The correctness of this contention becomes more apparent when it is remembered that the subject matter over which this reservation relates is the public highways, and which power, as was said in an opinion by the U. S. Circuit Court of Appeals of the Sixth Circuit, in which the same *Justice* conurred:

"That public streets are a public trust, to be held and preserved for legitimate street uses, is an obvious truth. That the ordinary power to control the public streets usually conferred upon all municipal governments will not justify a diversion to other uses, nor support a delegation of the power of control to others, or any abridgement of the legislative authority of the city over the streets, is well settled law."

Detroit Citizens St. Ry. Co. vs. Detroit, 22 U. S. App. 570, 583.

Another U. S. Circuit Court doubted whether in such cases a Federal question is involved, as there could be no impairment of the obligation of a contract if the City Council only did, by the repeal of the Ordinance relating to the use of the streets, what the Legislature could have done under the reserved power in the State Constitution. On this point, *Judge Hammond* said:

> "If it were certain that the State had the power to alter and repeal the plaintiff's charter at will, I should be inclined to take the defendant's view of this question, and hold that so far as this particular article of the Federal Constitution is concerned, no Federal question could be presented, under such a charter; because what the State might do of itself it could do by its municipal agencies as well; and whether or not the State had authorized such an agency to do such a thing as that complained of, or whether or not the State had the power under its Constitution to confer such authority on the given agency, and the like, would present no Federal question; but one only of the law of the State apart from its connection with the other."
>
> *Citizen's St. R. Co. vs. Memphis, 53* Fed. Rep. 716.

In the case at bar, the reservation under the State Constitution of Maryland is positive and unqualified, as is seen from the quotation above.

Both *Chief Judge Alvey* and *Judge Morris*, of the Courts below, passed on this reservation in the Act of 1892, ch. 112. *Chief Judge Alvey* said:

> "It is quite clear that the Act of 1892, chapter 112, has in no manner divested the Mayor and City Council of their power over the streets of the city upon which the tracks of the appellant may be laid; but on the contrary, that Statute is careful to reserve to the city 'the same power and control *hereafter* in reference to the enforcement, *amendment or repeal*, of said Ordi-

nance, as it has or would have in respect to *any* Ordinance passed under its general powers." (Italics his.)

Lake Roland El. Ry. Co. vs. Baltimore, 77 Md. 354, 384. See also Record, 189.

Judge Morris said:

"The Act of 1892, chapter 112, as I understand it, goes to the extent of a recognition by the Legislature (as had before been held by the Court of Appeals of Maryland), that the Ordinance No. 23, except as to the elevated structure, was, when it was passed, a valid exercise of the *general powers* which were vested in the city, and the Act provided that so far as any Ordinance passed under those general powers was subject to amendment or repeal by the city, this Ordinance should remain so. The proviso, if it has any *effective force*, must, it seems to me, have reference to some supposed power of the city in its governmental capacity for the public welfare to require the railroad to be constructed or operated, or restricted in some manner different from the precise manner set out in the Ordinance, some change of speed differing from that provided in the Ordinance, some change with respect to its overhead electric wires, or *some change in the location of the tracks on the streets.* If it had no reference to some such alteration or modification of the terms of the Ordinance, the insertion and enactment of the proviso would seem to have been *idle and nugatory.*"

Baltimore Trust & G. Co. vs. Baltimore, 64 F. Rep. 163. See also Record, 234.

As *Judge Morris* said, in closing the above extract of his opinion, if the reservation in Act of 1892, chapter 112, does not enable the appellant to change Ordinance No. 23 in some respects, and in those respects named by this Judge, what was the purpose of the reservation? Truly it would be "*idle and nugatory.*"

The appellant therefore contends that by reason of this reservation, it had the lawful right and power to pass Ordinance No 1, and that no vested right was thereby disturbed, as none could exist in the use of a public

street, because there could be no grant in this respect which would be beyond the reach of repeal by the State, under the Constitution, nor beyond the power of revocation, under Act 1892, chapter 112, by the municipality, the agent of the State.

IV.

Fifteenth Assignment of Errors.

Ordinance No. 1 is a valid exercise of the power of REGULATION by the city of Baltimore of the use of its streets by railway tracks, as conferred on it by the Act of 1890, chapter 370, and does not impair the obligation of a contract and is not in violation of section 10 of article 1 of the Constitution of the United States.

The language of the Act of 1890, chapter 370, relating to railway tracks, is as follows:

> "The Mayor and City Council of Baltimore shall have power to regulate the use of the streets, lanes and alleys in said City by railway or other tracks, &c."

In considering the scope of the express power conferred on the appellant over the streets by the Act of 1890, chapter 370, it is immaterial whether the Act be regarded as declaratory of the power previously existing in the appellant under its charter as to its control over its streets, or is an amplification of that power, or conferred on it additional power in this respect.

It is sufficient for the purposes of the claim of the appellant under this division of the brief, that the Act in question was a part of the charter of the appellant, prior to the 8th April, 1891, the date of the passage and approval of Ordinance No. 23, and is to be read, therefore, as if it were a part of this Ordinance. This is true because Ordinance No. 23 was subject, as has heretofore

been shown, to an absolute repeal by the Legislature, which was impliedly a condition of the grant, and so accepted, and no vested right would have been destroyed. This being so, the Legislature was empowered to endow its agent with so much of this power as it deemed proper, even if it were a total repeal of the Ordinance, which it is claimed elsewhere in this brief by the Act of 1892, chapter 112, was actually done. The grant by the appellant under Ordinance No. 23, must have been, therefore, originally accepted as subject to this power of the Legislature over its creature, the municipal corporation, and those receiving grants from it.

The important inquiry then is, what is the scope of the power of regulation of the use of the streets conferred by the Act of 1890, on the appellant?

All that has been said under the first head of this brief in relation to the powers of a municipal corporation, as to grants made by it to street railways for the use of its streets by railway tracks, under the power to regulate their use, related to the *limitations* on this power of the appellant under its general power of regulation in making such grants, and especially the grant under Ordinance No. 23.

It is now desired to present for the consideration of the Court the views of the appellant as to powers of *modification, amendment or repeal* of the grant under the reserved power to *regulate* the use of the streets as to railway tracks, conferred on the appellant by the Act of 1890, chapter 370.

In seeking to ascertain the correct meaning and scope of the word *regulate*, it is essential always to keep in the mind's view the subject or object to be affected by the exercise of the power of regulation, as used in the statute under consideration; or in other words, regard

must be had to the subject matter of regulation and the objects and purposes of the law.

To regulate, may have a broader meaning when applied to certain subjects or objects than when applied to others.

There is no subject to which the word regulate, when applied, should have a broader meaning and wider scope, than to the regulation of the use of the streets or public highways. Over them the State, or its authorized agent, is charged at all times with a vigilant guardianship, and it is the imperative duty of the State, or those intrusted by the State with this duty, to see to it that this continuing trust is so administered that the public at large shall, at all times, have the freest, safest and most convenient use of the public highways. When therefore, this responsible duty is conferred by the State on one of its municipal corporations, and the word or term used to express and confer this trust is *regulate*, there should be no limit prescribed by the Courts to the reasonable exercise of the power thus conferred to attain the end in view.

In such cases, *to regulate* may include the power of *prohibition* as to the *kind* of use, or as to *any use* by a certain class of objects or subjects. This is not a destruction of the principal thing to be regulated, viz.: the use of the streets by the public; this use continues, but that use, the principal thing to be regulated, is best preserved by the *prohibition* of the use of the highways in certain ways. This regulation of its use may result in the destruction of the privilege of a certain class to use the highways in a certain way, but this is only making subordinate, a private interest to the welfare of the general public. The use by the public of the highways, the thing to be regulated, is not only not destroyed, but continued under improved conditions. Courts ought not, therefore, when called upon to define the meaning

and scope of *to regulate the use of the streets*, strive to narrow its meaning but rather enlarge it.

The appellee may concede the correctness of the above argument, if the power conferred by the Act of 1890, chapter 370, was only "*to regulate the use of the streets*," but doubtless it will be contended by the appellee that the power as conferred has, by its terms, a limitation on it. The grant of the power being "to regulate the use of the streets *by railway or other tracks*," and that these terms suppose the continued existence of railway tracks, the thing to be regulated, as one of the uses of the street; if it were otherwise, it may be claimed the power of *regulation* would be converted into one of *prohibition*. There are two answers to this position, First, Ordinance No. 1 is not a prohibition against the use of Lexington street by *all* railway tracks, but only one of regulation of the number of tracks which may be placed on that street, the thing to be regulated, according to the claim of appellee, viz., *railway* tracks on the public streets, does continue and is not prohibited; and Secondly, the object of the Act is the regulation of the use of the streets, not alone by railway or other tracks, but by all things, so that the preservation of the use of the streets for the public at large may be preserved. The thing to be regulated is not, therefore, the use of the streets by railway or other tracks, but the use of the streets by all such things as do not appertain to the primary use of a public highway, and which may interfere with the use of those streets by the general public. If to allow such uses do not materially interfere with this primary use, they may be permitted; if they do, they *may be prohibited*; or if once *permitted*, and afterwards it is found they interfere with the primary use of the public highways, under the continuing power to regulate, they may in part or entirely be prohibited. It is to secure a beneficial use of the streets to the general

public, which the Act in question makes as the controlling and principal thing to be regulated; not street railway tracks in those streets.

The meaning and scope of the power to regulate is considered and discussed in the following cases, and support the above views of the appellant:

St. Louis vs. Western Union Tel. Co., 149 U. S., 465, 469.
Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196.
C. B. & Q. R. Co. vs. Iowa, 94 U. S. 156.
Attorney General vs. Boston, 142 Mass, 200; 7 N. E. Rep., 722, 724.
Louisville City R. Co. vs. Louisville, 8 Bush. 415.
Commonwealth vs. Stodder, 2 Cush., 562, 571.
Union Ry. Co. vs. Cambridge, 11 Allen, 287, 294.
Lake Roland El. R. Co. vs. Baltimore, 77 Md., 352, 385.

The term *regulate* has been given by this Court in *St. Louis vs. West. U. Tel. Co.*, 149 U. S. 469, a meaning. The extent of the power conferred by this word, when used in the charter of a municipal corporation in connection with its streets, has also been defined, which fully sustains the claim of the appellant as made in the case at bar. In this case, the charter of the City of St. Louis, among other things, provided as to its streets, that the city should have the power "*to regulate the use thereof*," (page 468.) The question arose whether the city had the power under its charter to require telegraph companies which occupied its streets with their poles, to pay a rental charge per pole for this use. The companies in resisting the payment of this annual charge of five dollars per pole, imposed under Ordinance No. 11,604,

passed by the City Council of St. Louis, contended, among other defences, that the City of St Louis had no power under its charter to impose this rental charge. In reply to this claim, this Court referred to the above provision of the charter, and *Mr. Justice Brewer* for the Court gave the following meaning to the term *regulate*, as well as the extent and scope of the power over its streets conferred on the city of St. Louis by the use of this term in its charter. He said:

> "It is given power to open and establish streets, to improve them as it sees fit, and to *regulate* their use, paying for all this out of its own funds. The word *regulate is one of broad import.* It is a word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this Court will perceive how *broad and comprehensive* it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by Ordinance No. 11, 604, it simply *regulates* the use when it prescribes the terms and conditions upon which they shall be used. *If it should see fit to construct an expensive boulevard in the city,* AND THEN LIMIT THE USE TO VEHICLES OF A CERTAIN KIND, *or exact a toll from all who use it, would that be other than a regulation of the use?* And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been in opening and improving the street."

Apply the above definition of the extent of the power over the streets conferred by the term regulate on the City of St. Louis, as given by Mr. *Justice Brewer*, to the facts of the case at bar, and in it will be found ample legal justification for the passage of Ordinance No. 1, under the Act of 1890, chapter 370.

Lexington street is the only east and west unobstructed thoroughfare the City of Baltimore has. Nearly $600,000 has been spent of the public monies to obtain

this public convenience. (Mayor's Message, Appendix.) Two tracks on that street, between Charles and North streets, will destroy that unobstructed thoroughfare, and render that portion of the street unsafe and dangerous to the use of it by the general public. For this reason the appellant, under its power to regulate, by Ordinance No. 1 prescribes and ordains that only one track shall be placed on that street for three squares, or 1100 feet. May not the inquiry of *Mr. Justice Brewer*, with a slight modifiation, be asked in the case at bar, and an affirmative reply with equal confidence expected?

> *If it* (Baltimore) *should see fit to construct an expensive boulevard* (Lexington street) *in the city and then for three squares limit its use to one railway track instead of two, would that be other than a regulation?*"

In *Gloucester Ferry Co. vs. Pennsglvania, supra*, Mr. *Justice Fields*, in defining the term *regulate*, used in the Constitution of the United States, relating to foreign and interstate commerce, gives the following comprehensive definition of the powers conferred by this term:

> "The power to *regulate* that commerce, as well as commerce with foreign nations, vested in Congress is the power to prescribe the rules by which it shall be governed—that is the conditions upon which it shall be conducted; to determine when it shall be free, when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged. The subjects therefore upon which the power may be exerted are of infinite variety."

In *C. B. & Q. R. Co. vs. Iowa, supra*, the question of the power of *regulation* of railroads as to rates of fare and freights, was considered and decided. The power of regulation was declared to be a *continuing power*, and

Mr. *Chief Justice Waite*, in reply to the claim that a diminution of the rates of fare and freight would lessen the income and means to pay debts of the company, said:

> "Neither does it effect the case, that before the power was exercised, the company had pledged its income as security for the payment of debts incurred and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. *After the pledge and after the lease the property remained within the jurisdiction of the State and continued subject to the same governmental powers that existed before.*"

In *Attorney-General vs. Boston, supra, Judge Devens*, formerly Attorney-General of the United States, speaking for the Supreme Court of Massachusetts, and referring to the power conferred by the term *regulate* in the charter of the city of Boston, relating to sidewalks, said the term implies the power to *prohibit* the use of sidewalks, under certain circumstances. The charter provision (Act 1833, chap. 128,) under review by the Court, in referring to the City Council of Boston, said it

> "May, by any ordinance or ordinances empower the surveyors of highways to *regulate* the width and height of sidewalks * * * as shall in the judg ment of said surveyors be most conducive to the convenience and interest of said city, any law of the commonwealth to the contrary notwithstanding."

There was a further provision in the charter of Boston empowering surveyors to accept sidewalks from the abutters and keep them in repair at the expense of the city.

The Board of Aldermen passed an Ordinance not only refusing to accept a certain sidewalk, but directed its removal by the abutting owner.

In reply to the contention that the word *regulate* as used in the above statute did not justify the abolition of the sidewalk, because that would result in a *prohibition* of the sidewalk and not *its regulation*, *Judge Devens* said:

> "Its (Act 1833) object was to place within the control of the city the whole subject, and under it, if it was not deemed necessary that any sidewalk should be constructed, it was not obliged to accept such sidewalk and impose the burden upon the city. While the word '*regulate*' as applied to the sidewalks, may often imply the existence of the thing to be regulated, such is not an absolute necessary construction. The power to regulate the use of the streets of a city implies the power to prohibit the use of them under certain circumstances."

In the case of *Louisville City Ry. Co. vs. Louisville, supra*, there was a power conferred on the City Council of Louisville to contract with a street railway for the use of the streets of Louisville, but by the same Statute the power of *regulation* of the use of the streets was reserved to the city. Under the power of regulation the Court sustained the right of the City Council by Ordinance to compel the company to take up its tracks on Jefferson street, which was being repaved, and in lieu of them, to place other rails of a different style, and if the company failed to comply with this requirement, the Ordinance provided that the street was to be repaved, with no provision for any track. (See same case, Brief, 39.)

In sustaining the right claimed by the city under the power of *regulation*, the Court said:

> "The Act of Nov. 2, 1863, which by the terms of the charter of the railway company, is made to control and limit the power of the General Council to contract with that corporation, requires such Council to reserve the right to *regulate* and control such railroad, as it may authorize to be laid down and operated in any of the streets or highways of the city.. *This limitation is for the benefit and protection of the public, and must be so construed as to accomplish the end and purpose of the Legislature.*

Chief Judge Alvey, in *Lake Roland E. Ry. Co. vs. Baltimore, supra*, as to the Act of 1890, chapter 370, said:

> "But, in this case, to say nothing of the general indefeasible nature of the legislative power vested in the Mayor and City Council in respect to the streets, the express statutory reservation of the power to regulate the use of the streets by railways, (1890, ch. 370,) secures to the Mayor and City Council, the *paramount right at all times to control the street and to determine that no more than a single track shall be maintained thereon.*"

It is to be remembered that this is the judicial interpretation by the highest Court of the State of Maryland, of a clause of the appellant's charter, which was a part of its organic law, before Ordinance No. 23 was passed. Does not this interpretation bind this Court (*Claiborne & Co. vs. Brooks*, 111 U. S. 710)?

It is for the reasons above given, and upon the strength of the authorities cited, respectfully submitted, that under the power to regulate the use of the street by railway and other tracks, conferred by the Act of 1890, chapter 370, the appellant had the right to pass Ordinance No. 1.

V.

A Review of the Opinion of Judge Goff assigning his reasons for passing the decree in this cause.

> 1. "Which (Ordinance No. 23) authorized the construction of double tracks on Lexington street in Baltimore, from the corner of Charles and Lexington streets, *the city terminus of the railway system of the Lake Roland Elevated Railway Company* eastwardly along Lexington street to where it connects with North street." (Record, 224.)

The Circuit Judge seems from the above extract to have assumed that the corner of Lexington and Charles streets was the sole terminus of the Lake Roland Company, while the fact is that in addition to this terminus it had another four squares distant from Lexington and Charles streets, and more central than the one at the corner of the above streets.

Ordinance No. 23, section 1, gives the termini as follows:

> "And running thence on Guilford avenue and North street southwardly to the intersection of North street with Lexington street, and thence on Lexington street westwardly to Charles street, *and on North street southwardly to the north side of Fayette street.*"

> 2. "In the General Railway Act (Act of 1876, chapter 242, section 13, same as Article 23, section 169, P. G. L. Appendix) under which that company (North Ave. Co.) was incorporated, it was provided '*that no railroad company shall be allowed to pass through the city of Baltimore without the* CONSENT *of the municipal authorities*': and therefore the said North Avenue Company made application to the Mayor and City Council of Baltimore for consent to the use of certain streets of that city, including the right to lay and maintain double railway tracks on Lexington street, from North street to Charles street, so that it might reach its proper terminus at the corner of Charles and Lexington streets. An ordinance was offered in the Council on the 17th day of November, 1890, properly referred, considered and reported, and on April 8th, 1891, passed and approved, now known as Ordinance No. 23." (Record, 225.)

In another portion of his opinion *Judge Goff* repeats substantially the above statement as to the *consent* contained in the Railway Act, as follows:

> "The General Railway Act of 1876, gave the municipal corporation of Baltimore the general power to *consent* or refuse assent to the use of its streets by railroad tracks." (Record, 228.)

We thus have twice in the opinion of the lower Court it distinctly stated that Section 169, Article 23, P. G. L., which is the codification of the Railway Act of 1876, chapter 242, section 13, empowers the appellant to *consent* to Ordinance No. 23.

To this assumption of *Judge Goff* as to the appellant being empowered by the Railway Act to *consent* to street railways occupying the streets of Baltimore city, it is only necessary to have this Court read first, the section of the Railway Act (section 13) referred to by *Judge Goff*, as it appears in the Railway Act printed in the appendix, and then to have this Court read the opinion of the Court of Appeals construing that Act, delivered on the 13th July, 1882, *nine years before the passage of Ordinance No. 23*, which was as follows:

> "In regard to the general railroad law of 1876, we should question very much but for the decision in *Oler's Case*, 41 Md., 583, whether this Act was intended to apply to street railways. Few, if any, of its provisions have reference to railways of this character. Section 13 of that Act provides that if it shall be necessary in the location of any railroad, to occupy any road, street or ground of any kind, the municipal or other public authorities having charge thereof, and the railroad company may agree upon the manner and terms upon which the same may be used, and if the said parties are unable to agree the company may appropriate so much of the same as may be nececsary, in the same manner and npon the same terms as provided for in the appropriation of the property of individuals by the tenth section of that Act, provided also that such railroad company shall be responsible for injuries done to private property. *This section further provides that no railroad company shall be allowed to pass through the city of Baltimore, without the consent of the municipal authorities.*
>
> "Section 14 authorizes such railroad companies to charge for transportation of passengers not exceeding three cents per mile; and for transportation of property other than coal, ores or other minerals, not exceeding five cents per ton per mile.
>
> "THESE PROVISIONS, IT IS PLAIN, HAVE NO REFERENCE TO THE CONSTRUCTION OF STREET RAILWAYS FOR PASSENGERS.
>
> "There is then no general law conferring the rights and prescribing the terms and conditions on which the

defendant was to construct and operate its railway on certain streets in the city of Baltimore."

Hodges vs. Balto. Passenger Ry. Co., 58 Md., 622.

(See also this Brief, pages 23-26.)

We have in the above opinion an express adjudication of the highest Court of Maryland, that *Judge Goff's* assumption, in his opinion, that the Railway Act conferred power on the appellant to *consent* to the passage of Ordinance No. 23, is wrong. This interpretation of the Railway Act, made nine years before the passage of Ordinance No. 23, was a part of the appellant's charter when the Ordinance was passed, and is binding on this Court.

Claiborne & Co. vs. Brooks, 111 U. S. 710.

2½. Judge Goff in his opinion next recites the various requirements imposed on the North Avenue Company by Ordinance No. 23. (Record, 226.) These requirements were the conditions of the *license* granted, and most of them were the usual conditions imposed on all streets railways which were allowed to occupy the streets of the city.

The requirements providing for the electric wires and poles of other companies on the elevated structure was because the elevated structure interferred with these wires and poles, and before the license was granted provision had to be made for them on the structure, the construction of which required their removal. The park tax is levied by a Statute of the State on all street railways as a charge for the use of the streets of the city. (*Baltimore vs. Baltimore C. & E. M. Pass. R. Co.* –Md.–; 35 Atl. Rep. 17.) So, with the other conditions specified in the Ordinance; they are all wise and proper conditions to be required and enforced in the interest of the public. They were conditions of the license, not of any contract, because the city could not enter into contractual relations with a street rail-

way for the use of its streets, as has been heretofore endeavored to be shown in this brief.

> 3. "The General Railway Act of 1876, gave the municipal corporation of Baltimore general power to consent or to refuse assent to the use of its streets by railroad tracks, *and independent of this, it has been held for years that such municipalities have that general power without the direct authority of the Legislature, so far as local or street railways are concerned.* Dillon's Municipal Corporations, 4th Ed. section 724. Hinchman vs. Patterson Horse R. Co., 2 C. E. Green, 75. Jersey City & Bergen R. Co. vs. Hoboken R. Co., 20 N. J. Eq. 69. Atchinson St. Ry. vs. Missouri Pac. R. Co., 31 Kan. 600. Brown vs. Duplessis, 14 La. An. 842. State vs. Corrigan Consolidated Street Railway Co., 85 Mo. 263." (Record, 228.)

The first clause of the above citation is met and answered under the second point of this Review, and may be repeated by the simple statement that the Court of Appeals, on 13th July, 1882, said and decided just the contrary.

As to the second clause, it may be only necessary to say that *Judge Goff's* opinion is the *second decision of any Court in the land* sustaining the proposition that under the general powers of a municipial corporation it can contract away the use of its streets to street railways. This decision by *Judge Goff*, and *State vs. Corrigan*, 85 Mo. 263, stand alone in the annals of Judicial history and adjudication in support of that proposition.

The authorities relied on by the learned *Judge* below, all of which are given in the above quotation, give not a particle of support to the doctrine of *Judge Goff* and the Supreme Court of Missouri in *State vs. Corrigan, supra;* they are not authorities in support of this proposition.

A consideration of these authorities will satisfy this Court of the correctness of the above statement.

(*a.*) *Dil. M. Corp.* section 724. This author simply says in this section that street railroads differ from steam railroads in not being an additional servitude on a public highway, and may be *permitted* by a city. This section does not say a city may contract away its control over the streets to a street railway. In a preceding section 716, this learned author gives his full approval to the cases of *Davis vs. New York and Milhau vs. Sharp, supra*, which would be inconsistent with the doctrine claimed to meet his approval in section 724.

In this brief, on page 35–38, a discussion of Mr. Dillon's views on this question is presented.

(*b.*) In *Hickman vs. Patterson Horse R. Co.*, 17 N. J. Eq. 75, S. C. 2 C. E. Green 75, the Court expressly holds that authority from the Legislature is necessary for a city to grant the use of its streets to a street railway, and that then it is not an additional servitude, the point of the decision was that a street railway on a street was not an additional servitude. The Court says:

> "I am nevertheless of opinion that the building and operation of a horse railroad in the streets of a city, under the restriction and limitations contained in the charter of the defendants, by *authority of the Legislature* and of the City Council, is a legitimate use of the highway and an exercise of the public right of travel, and not a taking of private property for public use within the provisions of the Constitution."

How this case can be possibly considered an authority in support of the above statement made by the learned Judge below, it is impossible to see.

(*c.*) In *Jersey City & Bergen R. Co. vs. Jersey City & Hoboken Horse R. Co.* 20 N. J. Eq. 64, the Legislature gave express authority to the Common Council of Jersey City to contract to occupy the streets of the city by a street railway company.

The Act of March 17th, 1860, as given on page 64 of the report of the case, provided that the street railway company,

> "In laying, repairing and maintaining their rails and in constructing their roads in the streets of Jersey City shall be subject to such conditions as the Common Council of said city, in the Ordinance granting consent to lay such rails and construct said road, have imposed, or shall impose upon them."

This case clearly does not support *Judge Goff's* proposition that the general powers of a corporation justify the entering into an irrevocable grant or contract for the use of its streets by a street railway.

(*d.*) *Atchinson St. Ry. Co. vs. Missouri P. R. Co.*, 31 Kan. 660, 3 Pac. Rep. 284, was a decision by Mr. *Justice Brewer*, when one of the Judges of the Supreme Court of Kansas, and gives no support whatever to the proposition stated by *Judge Goff*. Upon the contrary, it is against the proposition, if read in the light of the subsequent decision by the same *Judge* when a Circuit Judge of the U. S. Circuit Court of Kansas, reported in 24 F. R. 308, and heretofore cited and discussed on pages 44–46 of this brief.

The 31 Kansas, 660 case only decides that the street railway in that case "*was rightfully occupying the streets with its tracks*" and expressly declines to decide whether the City Council could grant "*a vested right for a series of years*" in the public streets.

(*e.*) *Brown vs. Duplessis*, 14 La. An. 842, is the case of a contract under a power given the city of New Orleans not only to consent to the use of the streets for railway purposes, but to sell the right of way over its streets, and does not sustain the proposition of *Judge Goff's*, which it is cited to support. This case and the provisions of the charter of New Orleans is considered by

Judge Taft, in 56 Fed. Rep. 878, *supra*, and *Judge Bryan*, Record, 180.

(*f.*) This leaves *State vs. Corrigan*, 85 Mo., 283, as the sole cases relied on by *Judge Goff*, which gives any support to the proposition under consideration. This case, in the first place, has nothing to do with the direct question whether a municipal corporation, under its general powers, can contract with a street railway for the use of its streets, for railway purposes, but only as to whether the provision in the original Ordinance in question relating to certain repairs of the streets could be changed after acceptance by the company, by a subsequent Ordinance, and in that connection the original Ordinance was said to be a contract.

It will be found that the Supreme Court of Missouri basis in a great measure its opinion in that case upon the erroneous idea that *Judge Dillon* in sec. 724 (see Brief, pages 35, 36, 37,) holds that a municipal corporation may contract in such cases. The authorities cited to support the views of the Missouri Court in addition to D. M. Corp. 724, is *Brown vs. Duplessis supra*, which has been shown does not sustain the proposition. Both these cases are considered and discussed by *Judge Taft*, in 56 Fed. Rep., 878, *supra*, and shown not to support the proposition under consideration.

> 4. "I think that municipal corporations, vested with full power to control and regulate the use of their streets, do not exceed their powers in making irrepealable contracts, not exclusive in character, for the use of said streets, for purposes relating to the public comfort and convenience, and also that a legislative grant made either directly by the Legislature, or indirectly through a municipal corporation duly authorized so to act, constitutes a contract between the parties thereto, the terms of which cannot be altered without their mutual consent, except so far as the right to alter, amend or repeal is expressly reserved in the grant itself or existed in constitutional or legislative provisions at the time of its passage." (Record, 229.)

The answer to this statement is that the reserved power of amendment and repeal stated by the learned Judge to be necessary, was expressly reserved in the matter of Ordinance No. 23, both by the Constitution of the State, Act 1890, chapter 370, and the Act of 1892, chapter 112, and impliedly by the fact that a municipial corporation's control over its streets is legislative and cannot *"be bargained or bartered away."*

The other statement in the above quotation, that a municipal corporation, with only the general powers of control and regulation of the use of the streets, can enter into a contract with a street railway for the use of its streets, without express authority from the Legislature, has endeavored to be shown under the first division of this brief, and elsewhere in this brief, not to be the law, and that the proposition has the support of but a single case in the country, that one being *State vs. Corrigan*, 85, Mo. 263.

> 5. "In construing the Statutes of a State we follow, as a rule, the interpretation placed thereon by its Court of last resort, but when connected therewith, is involved also the construction of the Federal Constitution, and the security of the interests protected by it, we feel impelled to rely upon the decisions of the Supreme Court of the United States." (Record, 231.)

It is respectfully submitted, with deference to the learned Judge, that the above is not a correct statement of the law followed by the Federal Courts as to the construction of charters of municipal corporations. The rule of law adopted by the Federal Courts in this respect, is to follow the construction of the highest Court of the State, and is thus stated in *Claborne Co. vs. Brooks*, 111 U. S. 700, 710, by Mr. *Justice Bradley:*

> "It is undoubtedly a question of local policy with each State, what shall be the *extent and character* of the powers which its various political and municipal

> organizations shall possess; and the *settled decisions of its highest Courts* on this subject will be regarded as *authoritative* by the Courts of the United States; for it is a question which relates to *the internal constitution of the body politic of the State.*"

The Court, after referring to the policy pursued by other local organizations in different States, as different from the policy followed by the local organization in the case then being decided, said:

> "But where a case comes before us from a State in which a different policy prevails, clearly shown by the local Constitution or Statutes, or by the *settled decisions of the State Courts, we are bound to decide it accordingly.*"

The Court of Appeals of Maryland, in three distinct decisions, viz: 59 Md. 64, 75 Md. 250 and 77 Md. 352, (Brief, Part 1,) construed the charter of Baltimore city to mean the reverse of what *Judge Goff* held it to mean.

VI.

Review of the Decisions relied on by the Appellee in the Court below.

There was a single case cited and relied on by the appellee in the Court below, which flatly decided that a municipal corporation, under its general powers of control or regulation of the streets, can make an irrevocable grant or contract of the use of its streets in perpetuity, or for a definite term for street railway purposes. This was the case of *State vs. Corrigan*, 85 Mo. 263. It has been previously endeavored to be shown in this brief, that the learned Court in that case based its decision, so far as authority for the same was concerned, upon a misconception of the meaning of *2 Dillon, Mun. Corp.* section 724, (Brief, 35-38,) and the case of *Brown vs. Duplessis*, 14 La. An. 842, which was a case as herein-

before stated, where the City of New Orleans had the express power of the Legislature to *sell the right of way over its streets for street railway purposes.* The strength of this case is therefore much weakened by the apparent errors into which the Supreme Court of Missouri fell. Outside of this case there is not a single case to be found, so far as has been discovered, where the doctrine contended for by the appellee finds any support.

In the other cases cited and relied on by the appellee, it will be found, either

1. That they were based on contracts, which, by the express authority of the Legislature, the municipalities were empowered to make.

2. That they did not relate to the use of the surface of the streets so as to interfere with their use by the public, but for the construction of gas pipes laid under the streets, which as *Judge Taft,* 56 Fed. Rep. 875, speaking as to this distinction, says:

> "Another distinction is that the easement to be conferred in the case of a street railway is on the surface of the street where public travel is, where the gas pipes are laid under the streets, and do not affect the travel in the slightest degree."

3. That other of the cases cited and relied on by the appellee do not sustain the point for which they are cited, or what is said by the Courts is *dicta* and not *decision.*

Bearing in mind these considerations, let us examine some of these cases.

1. *City of Burlington vs. Burlington St. Ry. Co.* 49 Iowa. In this case, at page 146, the Court in its opinion says, that under the pleadings, by the Iowa practice, the capacity of the City of Burlington to pass the Ordinance granting the use of the streets, was not before the Court. The language of the Court is:

> Counsel for plaintiff first insist that the City possessed no authority under its charter to adopt the original Ordinance. The special charter under which the city was organized, was then in force, which it is claimed conferred no power upon the city to authorize the building of a street railway by defendant. The question here presented is not raised by the petition, and was not made in the Court below. The petition does not deny the authority of the city to pass the Ordinance, but inferentially admits it. The question involving the want of authority to pass the Ordinance, was not *raised* by plaintiff's demurrer; it can not be first presented in this Court."

2. *Coast Line R. Co. vs. Savannah*, 30 Fed. Rep. 646, was a case of paving about the tracks of a street railway; the amount of such paving by the company as required by the Ordinance, granting the privilege to use the streets, was increased by a subsequent Ordinance. The Court held the first Ordinance a contract, and that the second Ordinance impaired it. Why? In the language of the Court, because

> "The City of Savannah and the railroad company, by virtue of their respective charters, had the power to *contract*, and they did contract."

What the charter of Savannah was, does not appear from the case, but the Court holds it had the power to *contract.*

3. *Chicago vs. Seldon*, 9 Wall, 50, was a case relating to *repavement* by a street railway, which by Ordinance had been given the right to use the streets of Chicago, and the only requirement in this Ordinance was as to *repairs* of the pavement; and a subsequent Ordinance required it not only to *repair*, but to *repave*, which additional requirement the Court said could not be done, because it impaired the contract in the original Ordinance; and

the Court says this was a contract for the following reasons:

> "A point is made that the Legislature has not conferred or intended to confer authority upon the city to make this *contract*. We need only say that full power was not only conferred, but the *contract* itself has been since ratified."

4. *St. Louis vs. Western Union Tel. Co.* 148 U. S. 92, is relied on by the appellee to support its contention, and the portion of the opinion of the Court in that case, thus relied on, is as follows:

> "Again, it is said by Ordinance No. 11,604, the city contracted with the defendant to permit the erection of their poles in consideration of the right of the city to occupy and use the top cross-arms of any pole, for its own telegraph purposes, free of charge, and in support of that proposition the case of *New Orleans vs. Telephone and Tel. Co.* 40 La. An. 41 is cited. But in that case it appeared that the telephone company had set its poles and constructed its wires under and by virtue of the grant made by the Ordinance, hence the conditions named therein were held part of the contract between the city and the telephone company, which the former was not at liberty to disregard."

The Court, after citing a clause from the Opinion in the Louisiana case, which shows the statement above was the ground on which the case was decided, adds:

> "The same principle controlled the cases of *Commonwealth vs. New Bedford Bridge*, 2 Gray, 339. *Kansas City vs. Corrigan*, 86 Mo. 67, *Chicago vs. Sheldon*, 9 Wall. 50."

The complete answer to the appellee's reliance on this case is what was said in this case by *Chief Judge Alvey*, in the case of *Lake Roland Elevated Ry. Co. vs Baltimore, supra.* He said:

> Counsel for plaintiff first insist that the City possessed no authority under its charter to adopt the original Ordinance. The special charter under which the city was organized, was then in force, which it is claimed conferred no power upon the city to authorize the building of a street railway by defendant. The question here presented is not raised by the petition, and was not made in the Court below. The petition does not deny the authority of the city to pass the Ordinance, but inferentially admits it. The question involving the want of authority to pass the Ordinance, was not *raised* by plaintiff's demurrer; it can not be first presented in this Court."

2. *Coast Line R. Co. vs. Savannah*, 30 Fed. Rep. 646, was a case of paving about the tracks of a street railway; the amount of such paving by the company as required by the Ordinance, granting the privilege to use the streets, was increased by a subsequent Ordinance. The Court held the first Ordinance a contract, and that the second Ordinance impaired it. Why? In the language of the Court, because

> "The City of Savannah and the railroad company, by virtue of their respective charters, had the power to *contract*, and they did contract."

What the charter of Savannah was, does not appear from the case, but the Court holds it had the power to *contract.*

3. *Chicago vs. Seldon*, 9 Wall, 50, was a case relating to *repavement* by a street railway, which by Ordinance had been given the right to use the streets of Chicago, and the only requirement in this Ordinance was as to *repairs* of the pavement; and a subsequent Ordinance required it not only to *repair*, but to *repave*, which additional requirement the Court said could not be done, because it impaired the contract in the original Ordinance; and

the Court says this was a contract for the following reasons:

> "A point is made that the Legislature has not conferred or intended to confer authority upon the city to make this *contract*. We need only say that full power was not only conferred, but the *contract* itself has been since ratified."

4. *St. Louis vs. Western Union Tel. Co.* 148 U. S. 92, is relied on by the appellee to support its contention, and the portion of the opinion of the Court in that case, thus relied on, is as follows:

> "Again, it is said by Ordinance No. 11,604, the city contracted with the defendant to permit the erection of their poles in consideration of the right of the city to occupy and use the top cross-arms of any pole, for its own telegraph purposes, free of charge, and in support of that proposition the case of *New Orleans vs. Telephone and Tel. Co.* 40 La. An. 41 is cited. But in that case it appeared that the telephone company had set its poles and constructed its wires under and by virtue of the grant made by the Ordinance, hence the conditions named therein were held part of the contract between the city and the telephone company, which the former was not at liberty to disregard."

The Court, after citing a clause from the Opinion in the Louisiana case, which shows the statement above was the ground on which the case was decided, adds:

> "The same principle controlled the cases of *Commonwealth vs. New Bedford Bridge*, 2 Gray, 339. *Kansas City vs. Corrigan*, 86 Mo. 67, *Chicago vs. Sheldon*, 9 Wall. 50."

The complete answer to the appellee's reliance on this case is what was said in this case by *Chief Judge Alvey*, in the case of *Lake Roland Elevated Ry. Co. vs Baltimore, supra.* He said:

"But upon careful examination of the opinion of the Supreme Court, as delivered by *Mr. Justice Brewer*, I fail to perceive in what respect it can be regarded as having any decisive application to this case. That case is not like the present in any material respect. It was a proceeding to enforce the collection of a specific tax or rental assessed under an Ordinance of the city of St. Louis, upon each of a number of telegraph poles of the defendant, erected along the streets of the city; and the right to enforce the collection of such tax or rental was denied by the defendant company, upon the ground that such tax or rental was a mere privilege or license tax for the privilege of carrying on its business in the city; and that the assessment, and attempted enforcement and collection of such tax, were acts in violation of Article 1, section 8, paragraph 3 of the Constitution of the United States. This defense was not sustained by the Court. It is true, the defendant, as an additional defense, contended, that the city by its ordinance had contracted with the defendants to permit the erection of certain telegraph poles in the streets of the city, in consideration of the right of the city to occupy and use the top cross-arms of any such poles for its own telegraph purposes, free of charge. But the Court, upon the facts of the case, refuted that contention; and cited and quoted from certain decisions relied on by the defendant *only* to show that they had no application to the case. I do not find that there was anything *decided* in that case that supports the contention of the appellant here. *Nor do I think that the Supreme Court has in any case established a doctrine that supports the contention of the appellant.*" (Record, 191.)

The cases in 2 Gray, 339, and 86 Mo. 69, referred to in the above opinion, have nothing to do with the question involved in this case, and were not relied on by the appellee in the Court below.

The cases in 40 La. An. 41, and 9 Wall. 50, and which were relied on below, are referred to and discussed elsewhere in this Review.

5. *People vs. O'Brien*, 111 N. Y. 1, was the sale of the right to use the streets of New York, under a constitutional provision of that State empowering the city so to do. Under he Act of 1866, chapters 65 and 642, passed

under this constitutional provision, the sale was made in this case. (See 2 Dillon, Mun. Corp, section 715, note, and *Judge Bryan's* Opinion, Record, 179.)

6. *New Orleans R. Co. vs. Delamore*, 114 U. S. 510. This was the case of the sale of the right of way to a railway company of the use of the streets of New Orleans, and was a contract by virtue of the power conferred on the city by the Legislature, thus to sell. (See *Judge Bryan's* Opinion, Record, 180.)

7. *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S. 650. This case did not involve the use of the surface of the streets, but a contract by New Orleans with a gas company to supply gas to the city. The questions were not the same. (See *Judge Bryan's* Opinion, Record, 180.)

8. *New Orleans vs. Tel. & Tel. Co.*, 40 La. An. 41. The power was conferred by the Legislature on telephone and telegraph companies to erect and maintain their poles "along the streets of any city, *with the consent* of the Council as trustees thereof."

VII.

Conclusion.

For the reasons and upon the authority of the cases cited in this brief, the appellant respectfully submits that the decree of the Court below should be reversed and the bill dismissed, because—

1. There is no Federal question involved, for if the Legislature could have repealed Ordinance No. 23, as it unquestionably could have done under the reserved power in the State Constitution, then the repeal of the whole or a part of Ordinance No. 23, by the appellant, whether lawful or not, could not involve the impairment of the obligation of a contract and be in violation of the

Federal Constitution, and the demurrer of the appellant, (Record, 49,) should have been sustained and not overruled.

2. If there is a Federal question involved, then either because Ordinance No. 23 was a *revocable license*, or under the *police power*, or under the *reserved power of amendment* contained in the Act of 1892, Chapter 112, or under the power of *regulation* contained in the Act of 1890, Chapter 370, the appellant had the right to pass Ordinance No. 1, and its passage does not thereby impair the obligation of a contract, and is not in violation of the Federal Constitution.

THOMAS G. HAYES,
City Counselor,
THOMAS IRELAND ELLIOTT,
City Solicitor,
Counsel for Appellant.

APPENDIX.

ACT 1890, CHAPTER 370.

AN ACT to add an additional section to article four, Public Local Laws, title "City of Baltimore," sub-title "Streets," to be known as "Section eight hundred and nineteen A," giving the Mayor and City Council authority to regulate the use of the streets, lanes and alleys of said city by railway or other tracks, gas or other pipes, telegraph, telephone, electric light or other wires and poles.

SECTION 1. Be it enacted by the General Assembly of Maryland, That an additional section be added to article four, Public Local Laws, title "City of Baltimore," sub-title "Streets," to be known as "Section eight hundred and nineteen A," to read as follows:

SEC. 819 A. The Mayor and City Council of Baltimore shall have power to regulate the use of the streets, lanes and alleys in said city by railway or other tracks, gas or other pipes, telegraph, telephone, electric light or other wires and poles, in, under, over or upon the same, and may require all such wires to be placed under ground, after such reasonable notice as they may prescribe.

Sec. 2. And be it enacted, That this Act shall take effect from the date of its passage.

Approved April 3, 1890.

ACT 1892, CHAPTER 112.

AN ACT to confirm ordinance No. 23, approved April 8, 1891, of the ordinances of the Mayor and City Council of Baltimore, entitled, "An Ordinance to authorize the construction of city passenger railway tracks by the North Avenue Railway Company of Baltimore City, on North Avenue from

McCulloh street to Guilford Avenue, and thence on Guilford Avenue and North street to Lexington street, and thence on Lexington street to Charles street and on North street to the north side of Fayette street."

WHEREAS, by ordinance number twenty-three, approved April 8, 1891, of the ordinances of the Mayor and City Council of Baltimore, entitled, An ordinance to authorize the construction of city passenger railway tracks by the "North Avenue Railway Company of Baltimore City on North Avenue from McCulloh street to Guilford Avenue, and thence on Guilford Avenue and North street to Lexington street, and thence on Lexington street to Charles street and on North street to the north side of Fayette street," the North Avenue Railway Company of Baltimore City was duly authorized and empowered to construct, maintain and operate an electric railway with the rights and privileges and subject to the terms and conditions in said ordinance set forth, including therein a right to elevate its tracks on North street in said city, but before the said North Avenue Railway Company of Baltimore City can elevate its tracks on North street as aforesaid, it is required by law that the sanction of the General Assembly of Maryland should be given to said ordinance so far as it relates to said elevation of its tracks, therefore:

Be it enacted by the General Assembly of Maryland: SECTION 1. That Ordinance No. 23, of the Mayor and City Council of Baltimore, approved April 8, 1891, be and the same is hereby ratified and confirmed; this ratification to have the same effect as if the Mayor and City Council of Baltimore, at the time of the passage of said ordinance, had been fully authorized by the General Assembly to pass said ordinance, and to grant each and all of the powers and privileges therein contained; the said Mayor and City Council to have the same power and control hereafter in reference to the enforcement, amendment or repeal of said ordinance as it has or would have in respect to any ordinance passed under its general powers.

SEC. 2. And be it further enacted, That this act shall take effect from the date of its passage.

Approved March 17, 1892.

ORDINANCE No. 23.

An Ordinance to authorize the construction of city passenger railway tracks by the North Avenue Railway Company of Baltimore City on North avenue, from McCulloh street to Guilford avenue, and thence on Guilford avenue and North street to Lexington street, and thence on Lexington street to Charles street, and on North street to the north side of Fayette street.

Section 1. Be it enacted and ordained by the Mayor and City Council of Baltimore, That the North Avenue Railway Company of Baltimore City be, and it is hereby, authorized to lay down and construct double iron railway tracks for the purposes of its business, and in connection with double tracks now authorized to be constructed by it on North avenue to McCulloh street, beginning for said extension on North avenue at its intersection with the east side of McCulloh street, the present terminus of the tracks of the said company as heretofore authorized, and running thence on North avenue, eastwardly, to Guilford avenue, and running thence on Guilford avenue and North street, southwardly, to the intersection of North street with Lexington street, and thence on Lexington street, westwardly, to Charles street, and on North street, southwardly, to the north side of Fayette street.

Sec. 2. And be it further enacted and ordained, That the said tracks shall be of the standard gauge maintained by other passenger railways in the City of Baltimore, and it shall be lawful for the Mayor and City Council at any time hereafter, by ordinance, to authorize any other railroad now incorporated, or hereafter to be incorporated, to use the tracks hereby authorized to be laid, or any part thereof, upon terms to be agreed upon between the North Avenue Railway Company of Baltimore City and the company asking the privilege of using said tracks; provided, however, if the said two companies cannot agree upon the terms upon which said tracks are to be used, the matter shall be referred to the arbitration of the Mayor, City Commissioner and President of the said The North Avenue Railway Company of Baltimore City for the time being, and the terms fixed by a majority of said Board of Arbitration

shall be binding upon the said North Avenue Railway Company of Baltimore City and the company asking said privilege; provided further, that no use shall be made of said tracks by any other road which will interfere with the general schedule adopted by the said North Avenue Railway Company of Baltimore City for the running of its cars.

SEC. 3. And be it further enacted and ordained, That it shall be lawful for the said North Avenue Railway Company of Baltimore City to use the tracks now laid on North avenue by the Baltimore City Passenger Railway Company, the Baltimore Union Passenger Railway Company, the North Baltimore Passenger Railway Company, or the Baltimore, Peabody Heights and Waverly Railroad Company, and the Baltimore and Yorktown Turnpike Road, in the manner and to the extent to which it is lawful for the Mayor and City Council of Baltimore to grant to the said North Avenue Railway Company of Baltimore City, the right to use said tracks, and in any case in which the said railroads are entitled to the exclusive use of said tracks, and the said North Avenue Railway Company of Baltimore City cannot agree with them for the joint use of their said tracks, then it shall be lawful for the said North Avenue Railway Company of Baltimore City to lay its rails inside and outside of said tracks of other roads, provided that if inside and outside rails are laid, the distance between its rails and the corresponding rails of other railroads shall not be less than six inches, nor more than two feet. The right to run the cars of the North Avenue Railway Company of Baltimore City on the tracks of the Baltimore, Peabody Heights and Waverly Railway Company, or the North Baltimore Passenger Railway Company, on North avenue, from Charles street to McMechin street, is hereby granted under the terms of Ordinance No. 74, approved June 7th, 1872, but nothing herein contained shall be construed to grant any right or privilege to the said North Avenue Railway Company of Baltimore City to lay any additional tracks on North Avenue bridge.

SEC. 4. And be it further enacted and ordained, That Ordinance No. 173, approved November 11th, 1889, and Ordinance No. 159, approved July 30th, 1890, of the Mayor and City Council of Baltimore, be, and the same are hereby,

repealed and revoked, so far as they authorize and empower the said North Avenue Railway Company of Baltimore City to propel its cars by electricity, cable or other improved motive power, but that from and after the passage of this ordinance it shall be lawful for said North Avenue Railway Company of Baltimore City to propel its cars by electricity supplied from overhead wires, upon and over any part of its railway now constructed or hereafter to be constructed, and to erect and maintain the necessary poles and wires for this purpose, upon complying with the terms and conditions following, that is to say:

(1.) That it shall be the duty of the said North Avenue Railway Company to protect its overhead wires from contact with electric light or rather wires, by proper guard wires, and to provide on said railroad every proper safeguard and improvement for public protection and convenience, which are in general use in other cities, using the overhead electric system, or which may, from time to time, be deemed necessary by the Mayor and City Commissioner.

(2.) That it shall be the duty of the said North Avenue Railroad Company in making the extension hereby authorized to use iron poles of neat and ornamented design, and whenever the width of the street permits of it, and it is in other respects feasible, said poles shall be placed between its two tracks, with arms on either side carrying the wires over each track; and provided further, that the Mayor and City Commissioner shall determine at what points upon the line of said company said poles shall be placed between the two tracks of said company.

(3.) That the said North Avenue Railway Company shall not charge more than one fare of five cents for any continuous single trip over any of its lines, and shall transfer its passengers free from any line operated by it to any other line operated by it, and that it shall carry over its line free of charge, passengers who present transfer tickets from any other City Passenger Railway Company which it crosses or connects with, which shall accept transfer tickets from the passengers of the North Avenue Railway Company of Baltimore City upon the same terms; provided, however, that the said North Avenue Rail-

way Company of Baltimore City shall not be obliged to accept such transfer tickets except from persons taking its cars at the place of such crossing or connection, and such transfer ticket shall be good only on the day of their issue, and for trasportation upon the cars of the said North Avenue Railway Company of Baltimore City passing said crossing or connection next after the arrival at said point of the cars of such other railroad from which the passenger presenting such transfer ticket shall have alighted.

(4.) That said North Avenue Railway Company shall at all times keep the spaces between its tracks and two feet on each side thereof in good repair, under the supervision of the City Commissioner, and whenever any portion of any street, upon which its tracks shall be laid under the provisions of this ordinance shall be repaved, then the said railway company shall be required to pay the entire expense of repaving said spaces with such payment as the Mayor and City Council shall prescribe; provided, however, that whenever any portions of North avenue so to be paved, repaved or repaired, are occupied by the tracks of any other City passenger railway or railways, said North Aveune Railway Company shall only be required to contribute its proportionate share of the expenses of such paving, repaving or repairing; and provided further, that under no circumstances shall the North Avenue Railway Company be required to pay more than one-fourth of the total cost of repaving the portion or portions of such street or streets upon which its tracks shall be so laid.

(5.) That it shall be lawful for the Mayor and City Council at any time hereafter to cause to be removed at the expense of the company, any or all of the poles * * * and overhead wires hereby authorized to be erected, after one year's notice to the said North Avenue Railway Company of Baltimore City, and it is hereby declared to be the distinct purpose and intention of this ordinance to give the sanction of the Mayor and City Council to the use of the overhead electric system by the said North Avenue Railway Company of Baltimore City, as a motive power and means of traction only upon its compliance with the terms and conditions herein set forth, and that the use

of the said overhead electric system by the said North Avenue Railway Company of Baltimore City shall be deemed an acceptance by it of all said terms and conditions. And it is further distinctly declared that nothing in this ordinance shall be in any manner construed so as to give to any other City passenger railway company the right to use the overhead electric system without the express consent of the Mayor and City Council.

SEC. 5. And be it further enacted and ordained, That it shall be lawful for the said North Avenue Railway Company of Baltimore City to bridge the tracks of the Northern Central Railway Company, from the corner of Eager and North streets to the corner of Saratoga and North streets, and to make the proper and necessary elevated structure for the purpose of effecting said crossing and the approaches thereto; provided, however, that in no case shall the said elevated crossing, or any part thereof, extend south of the present entrance to the Central Police Station building, or north of the corner of Guilford avenue and Chase street; and provided further, that if in ascending and descending said elevated crossing any part of the street shall be used, the ascent and descend shall be made in such a manner as to leave at least ten feet clear for the passage of vehicles between the curb line and the outside edges of the ascending and descending structure; and provided further, that all electric light, telephone, telegraph or other wires on North street, between Saratoga and Eager streets, belonging to the companies now operating such wires, may be strung by said North Avenue Railway Company upon fixtures adapted to their existing uses upon said elevated structure, at the cost of the said North Avenue Railway Company of Baltimore City, which shall maintain the said respective fixtures, and the poles now supporting the said wires between said streets may be thereupon removed by said company, it being intended by this provision, in the case of said removal, to substitute the said elevated crossing for the poles now erected on North street, between the above points, in such a manner that the companies owning the said poles may have the same free use of said structure for their said wires, without cost or inconvenience, as they now have, of their said poles, and all wires or cables, to be added to, or substituted for said wires, by the said respective

electric light, telephone and telegraph companies owning the same, may hereafter be strung and maintained upon said elevated structure in positions suitable to their proper uses, without charge or hinderance by said North Avenue Railway Company; but the expense of stringing said wires or cable, so to be added, shall be borne by the respective companies so stringing the same upon said elevated structure.

Sec. 6. And be it further enacted and ordained, That the said elevated crossing shall be so constructed that there shall be not less than ten feet clear width between the structure and the building line on North street, and not less than six feet of clear width between the said building line and the railroad platforms and stairways at the stations, (provided, however, that these requirements may be changed with the consent of the owners of abutting property,) and there shall be not less than seven feet clear width between the columns of the structure and the centre line of any steam railway track, and not less than twenty feet clear headroom under the structure over such steam railroad track, to conform to the bridge specifications of the Pennsylvania Railroad Company, and the structure shall be so built as to present no obstacle to the construction hereafter of elevated viaducts over the steam railroad tracks, on Centre and other cross town streets; and provided, that the columns of the structure which support the long spans and girders adjoining Centre and Madison streets shall not be more than twenty inches square; that all other columns supporting the structure shall be not more than fifteen inches square, and the said stations, with proper stairways, securely railed, shall be placed at the intersections of North street with Madison, Centre, Franklin and Pleasant streets; and provided further, that the said elevated crossing shall be constructed in accordance with the plan herewith submitted to be filed with the City Commissioner and which plan is hereby made a part of this ordinance; provided, however, that the said plan may be varied with the consent of the Mayor and City Commissioner.

Sec. 7. And be it further enacted and ordained, That the said North Avenue Railway Company of Baltimore City shall be liable to the payment of the park tax, and be subject to all the

other general regulations now existing, or hereafter to be made, relating to City Passenger Railways, not inconsistent with this ordinance, and shall in all other matters be subject to the provisions and possess the powers heretofore made and granted by the Mayor and City Council of Baltimore in respect to said North Avenue Railway Company of Baltimore City; provided, however, that nothing in this ordinance shall be construed to allow steam motive power to be used on said railway, or any part thereof; and provided further, that the cars of the said company shall not travel upon the streets of the City upon any part of its tracks lying to the east of Pennsylvania avenue at a greater rate of speed than ten miles an hour, exclusive of stoppages, except while on the elevated crossing on North street, when the speed may be increased to fifteen miles an hour, and that on any part of its tracks lying to the west of Pennsylvania avenue its speed shall not exceed fifteen miles an hour; and provided further, that no car shall be run on said railway without one conductor and one motor man; and provided further, that whenever it shall be necessary for the said company to cross any street gutters with its rails, it shall provide iron gutter plates at its own expense, similar to those in use, or to be used by the City; for all gutters that cross the intersecting streets parallel to the line of track, and all gutters that cross its tracks in a transversal direction, said iron gutter plates to be provided and put in place to the extent of at least ten feet beyond the corners of such intersecting streets, said plates to be laid to the extent and in the manner required by the City Commissioner, and to renew the same from time to time, as in his judgment may be necessary.

Sec. 8. And be it further enacted and ordained, That if at any time hereafter all the tracks of the Northern Central Railway Company shall be removed from the surface of North street, between Eager street and Saratoga street, the right is reserved to the Mayor and City Counsel to require the said North Avenue Railway Company of Baltimore City to remove the elevated crossing hereby authorized to be constructed, after one year's notice of its intention to require said removal; provided, however, that this right of removal shall not be exercised until the said Mayor and City Council shall first have made provision

for the occupation of the surface of North street, between Eager and Saratoga streets, by the tracks and wires of the said company, and shall also have provided by ordinance (but without expense to the City,) for the electric light, telegraph, telephone and other wires strung on said elevated structure. And provided further, that if the said elevated structure or its intended uses shall interfere with the crossing over such structure, and with the independent uses of the several existing telegraph, telephone or electric light wires now in operation on North street, between the limits aforesaid at such crossing, the expense of carrying said respective wires over and across said structure at the necessary higher elevation shall be repaid by the said North Avenue Railway Company of Baltimore City to the respective companies incurring such expense.

Sec. 9. And be it further enacted and ordained, That the said tracks, wires and poles hereby authorized, including the said elevated crossing, shall be laid and constructed under the supervision and direction of the City Commissioner, or such other person as the Mayor and City Council shall select; provided further, that if any final judgment shall be recovered against the said North Avenue Railway Company of Baltimore City for damages done to property by reason of the construction or use of said elevated crossing, then in addition to the ordinary remedies at law, the owner of such judgment shall have the further right to enjoin the operation of said railway, unless the same is paid within sixty days after the final decision of the action in which said judgment is rendered; and said company by accepting this ordinance or acting under the same, expressly agrees that the owner of said judgment shall be so entitled to such injunction and assents to the issuing of the same until such judgment is paid; and if any final judgment recovered against the said company, as aforesaid, shall not be paid within such period of sixty days, then from and after the expiration of such period, all the rights of the said company, its successorss and assigns, under this ordinance shall cease and be in abeyance until the judgment shall be paid, and the right to continue the construction or operation of the road shall only be revived after the payment thereof; and said North Avenue

Railway Company of Baltimore City, by the acceptance of the privileges hereby conferred, expressly agrees that it shall be responsible for injuries judicially ascertained to be done to private property or to persons by the construction or use of said elevated crossing.

SEC. 10. Be it further enacted and ordained, That the said North Avenue Railway Company shall employ none other than *bona fide* residents of Baltimore City as mechanics and laborers on its lines.

SEC. 11. Be it further enacted and ordained, That the Mayor and City Council of Baltimore shall have the privilege within two years after the expiration of fifteen years from the passage of this ordinance to purchase and buy out the stock and interest of said North Avenue Railway Company of Baltimore City, together with such appurtenances belonging to said company as the said Mayor and City Council may deem proper, for and at a fair and equitable valuation, and in case of a disagreement as to said valuation, the Mayor and City Council aforesaid shall appoint one referee, the said North Avenue Railway Company of Baltimore City or its assigns shall appoint another referee, who in the event of a disagreement, shall appoint an umpire, the decision of whom shall be final as to the price to be paid as aforesaid; and provided further, that if said Mayor and City Council shall decline or neglect to give notice to said company of their intention to make said purchase within the aforesaid two years, then the grants and privileges herein given to said company shall continue to them or to their assigns for fifteen years longer, subject to all the conditions and terms contained in this ordinance and renewable thereafter every fifteen years under the aforesaid terms and conditions.

SEC. 12. And be it further enacted and ordained, That this ordinance shall take effect from the date of its passage.

Approved April 8, 1891.

ORDINANCE No. 1.

AN ORDINANCE to regulate the use of Lexington street, between North street and Charles street, by railway tracks, and to prohibit the laying or maintaining, or using, by the North Avenue Railway Company, or any other person or corporation, of more than a single iron railway track upon said portion of Lexington street.

WHEREAS, By a provision in Section 1 of Ordinance No. 23, approved April 8, 1891, and entitled "An ordinance to authorize the construction of City passenger railway tracks by the North Avenue Railway Company on North avenue, from McCulloh street to Guilford avenue, and thence on Guilford avenue and North street to Lexington street, and thence on Lexington street to Charles street, and on North street to the north side of Fayette street," the North Avenue Railway Company of Baltimore City was authorized and licensed to lay down and construct double iron railway tracks for the purposes of its business on divers streets of the City, among others, on Lexington street, between North street and Charles street; and

WHEREAS, It appears to the Mayor and City Council of Baltimore that the public safety and convenience, and the proper regulation of the use of the streets, requires that there shall not be more than one iron railway track laid down, constructed, maintained or used on said portion of Lexington street; and

WHEREAS, The president and other officers of the said North Avenue Railway Company knew, before any expense was incurred by the said company, or before any portion of the work of laying said tracks on said portion of Lexington street had been done, that in the judgment of the Mayor and City Commissioner the laying of a double set of iron railway tracks on said portion of Lexington street would be detrimental to the public interest, and that the City Solicitor had given the opinion that the Mayor and City Council had full power to alter or revoke the authority given by said Section 1 of Ordinance No. 23, of April 8, 1891, to lay double iron railway tracks on said portion of Lexington street, and that the Mayor would on the earliest practicable occasion recommend the passage of an ordinance altering and revoking the authority to lay such double iron railway tracks on said portion of Lexington street; now, therefore,

SECTION 1. Be it enacted and ordained by the Mayor and City Council of Baltimore, That the first section of Ordinance No. 23, approved on April 8th, 1891, so far as the same authorized and empowered the North Avenue Railway Company to lay double iron railway tracks upon the portion of East Lexington street, between North street and Charles street, be, and hereby is, repealed, and that the authority and license given to said North Avenue Railway Company by said first section of said ordinance to lay such double iron railway tracks, be, and hereby is, revoked.

SEC. 2. And be it further enacted and ordained, That no person or persons, corporation or corporations, under any pretext, or under color of authority of any former grant or license, shall (except as hereinafter provided in the succeeding section of this ordinance,) lay down, construct, maintain, or use any iron railway tracks on that portion of East Lexington street, between North street and the east side of Charles street, and any and all iron railway tracks which may have been heretofore, or may be hereafter laid or placed on said portion of Lexington street (unless laid or suffered to remain under the provisions of the next succeeding section of this ordinance,) shall be removed by the person or persons by whom or by whose direction they were laid, within ten days after they may be notified to that effect by the City Commissioner; and in case of the neglect of such person or persons, or corporation, to so remove such iron railway tracks within the time specified, the same shall be removed by the City Commissioner.

SEC. 3. And be it further enacted and ordained, That the said North Avenue Railway Company of Baltimore City be, and it is hereby, authorized and licensed to lay down, construct, maintain and use one iron railway track, and no more, on East Lexington street, between North street and Charles street, in a location to be designated by the City Commissioner, upon the same terms and subject to the same provisions and limitations as were provided by the said Ordinance No. 23, of April 8th, 1891, in respect to the double iron railway tracks there authorized to be laid on said portion of Lexington street, and any other Company shall have the same, but no greater right

to use this single track that it would have had to use the double track if this ordinance had not been passed and the said Ordinance No. 23, of April 8th, 1891, had remained unaltered; provided, as a condition precedent to the right of the North Avenue Railway Company to exercise the authority or license in this section conferred upon it, the said North Avenue Railway Company shall, within twenty days from the passage of this ordinance, at its own expense, remove the whole or such portion of the double iron railway tracks that it has caused to be laid on said portion of Lexington street, as the City Commissioner shall designate, and shall also, at its own expense, replace the pavement on the said portion of East Lexington street in a manner satisfactory to the City Commissioner; and provided further, that any switches to connect other tracks with the aforesaid single track which the said North Avenue Railway Company, or any other company having the right to use said tracks, may desire to lay, shall be so laid as not to extend on Lexington street more than fifty feet east of the east side of Charles street, or to be entirely east of the west side of North street, and shall be constructed and laid subject to the approval of the City Commissioner.

SEC. 4. And be it further enacted and ordained, That this ordinance shall take effect from the date of its passage.

Approved November 18, 1892.

CHIEF JUDGE ALVEY'S OPINION.

When this case was originally decided by this Court, I fully concurred in the conclusion arrived at that it was competent to the Mayor and City Council of Baltimore to pass the repealing or restrictive Ordinance, No. 1, approved November 18th, 1892, limiting the appellant company to the use of a single track for its road on Lexington street, between North and Charles streets, and requiring it to remove the double tracks as by the ordinance directed. And after careful consideration of the reasons assigned by the appellant for a re-argument of the case, I remain of my former opinion.

The grounds of my judgment are briefly these. The Mayor and City Council, by statutory provision, are invested with *ex-*

press authority "to *regulate the use* of the streets, lanes and alleys of the city, by *railway or other tracks*," and this, as I understand it, is but an amplification of their general power over, and right and duty to regulate and maintain the streets and other highways of the city for the use of the public. It is quite clear that the Act of 1892, ch. 112, has in no manner divested the Mayor and City Council of their power over the streets of the city upon which the tracks of the appellant may be laid; but, on the contrary, that statute is careful to reserve to the city "the same power and control *hereafter* in reference to the enforcement, *amendment or repeal* of said Ordinance, as it has or would have in respect to *any* Ordinance passed under its general powers." The Ordinance referred to in this Act is the Ordinance No. 23, approved April 8th, 1891, under which the authority was first obtained from the city to lay railway tracks on Lexington street, and which was confirmed by the Act of the General Assembly of 1892, ch. 112, with the reservation just stated.

The power to maintain and regulate the use of the streets of the city is a trust for the benefit of the general public, and the primary use of the streets is not, by any means, that of furnishing tracks for street railways. The Mayor and City Council cannot divest themselves of this trust, nor can they so restrict their power over the streets as to defeat or seriously impair the beneficial enjoyment of the streets by the public in the ordinary and usual modes of passage thereon. The power vested in them, in respect to the streets, is of a legislative character; and they can neither restrict themselves, nor their successors, by any irrepealable Ordinance, in the exercise of such power over the streets, except it be by the express authority of the Legislature of the State. The power is a continuing one, to be exercised whenever the public needs may require it; and hence the power to regrade and improve the streets from time to time, must remain subject to the judgment and discretion of the legislative branch of the municipal government. But if the contention of the appellant could be maintained, the streets on which railway tracks are once laid, might, and most generally would, pass out of the control of municipal authority. For, however improvident or reckless might be the grant of

privileges to street railway companies, or however much their tracks might obstruct the use of the streets by the general public, perpetual easements or servitudes would be created in the streets, and the municipal authorities would be precluded from the exercise of the ordinary power of changing grades, or making other improvements of the street, that might materially interfere with the tracks, or the operation of the road, though public necessity for such improvement might be never so urgent. And, in such case, the only means of reclaiming the street to the absolute control of the city authorities, and to the general public use, would be by a resort to the power of eminent domain. But, in this case, to say nothing of the general indefeasible nature of the legislative power vested in the Mayor and City Council in respect to the streets, the express statutory reservation of the power to regulate the use of the streets by railways, secures to the Mayor and City Council the paramount right at all times to control the street, and to determine that no more than a single track shall be maintained thereon.

I am aware that it may be urged, and, indeed, it has been urged here, and it constitutes the full strength of the appellant's case, that upon the principles that I have stated as the ground of my judgment, there would be no sufficient protection to the property rights in a street railway. But I am far from saying that such property rights are not entitled to protection. If, in reliance upon a valid Ordinance, a railway company, in good faith, and without notice that the authority is about to be modified or withdrawn, has laid its tracks in the street of a city, and the municipal authorities afterwards conclude that the grant of the privilege was improvident, or detrimental to the public, and require the tracks to be removed, this can be enforced only upon principles of fair indemnity to the company. This is in accordance with a well established principle in the case of an executed license, where, to entitle the licensor to revoke the license, and to be restored to his former rights, he must do justice to the licensee, by indemnifying him for the expense which he has reasonably incurred under the license; but not for prospective profits that might be realized. This measure of indemnity the principles of justice

would seem to require, in such case as I have just stated. See *Addison vs. Hack, 2 Gill, 221.*

The recent case of *St. Louis vs. Western Union Tel. Co., 148 U. S., 92,* made the ground for the present application for re-argument, is supposed to be quite decisive of this case, in support of the contention of the appellant. That case was decided by the Supreme Court after the argument of this case, and the opinion was not brought to our attention until after the opinion in this case was filed. But, upon careful examination of the opinion of the Supreme Court, as delivered by Mr. JUSTICE BREWER, I fail to perceive in what respect it can be regarded as having any decisive application to this case. That case is not like the present in any material respect. It was a proceeding to enforce the collection of a specific tax or rental assessed under an Ordinance of the City of St. Louis, upon each of a number of telegraph poles of the defendant, erected along the streets of the city; and the right to enforce the collection of such tax or rental was denied by the defendant company, upon the ground that such tax or rental was a mere privilege or license tax for the privilege of carrying on its business in the city; and that the assessment, and attempted enforcement and collection of such tax, were acts in violation of Art. 1, sec. 8, paragraphs 3 and 7 of the Constitution of the United States. This defence was not sustained by the Court. It is true, the defendant, as an additional defence, contended, that the city, by its Ordinance, had contracted with the defendant to permit the erection of certain telegraph poles in the streets of the city, in consideration of the right of the city to occupy and use the top cross arms of any of such poles for its own telegraph purposes, free of charge. But the Court, upon the facts of the case, refuted that contention; and cited and quoted from certain State decisions, relied on by the defendant *only* to show that they had no application to the case. I do not find that there was anything *decided* in that case that supports the contention of the appellant here. Nor do I think that the Supreme Court has in any case established a doctrine that supports the contention of the appellant.

I therefore think the motion for re-argument should be overruled.

MAYOR'S MESSAGE WITH ORDINANCE No. 1.

MAYOR'S OFFICE, BALTIMORE, *November 14th, 1892.*

To the Honorable the Members of the City Council:

GENTLEMEN: I send herewith an ordinance repealing so much of an ordinance approved April 8th, 1891, as authorizes the North Avenue Electric Railway Company, now known as the Lake Roland Elevated Railroad Company, to lay double tracks on Lexington street, between North and Charles streets. Although the powers conferred by the ordinance have since apparently been ratified by an Act of Assembly of 1892, chapter 112, approved March 17th, I am advised by the City Solicitor that such power of repeal exists in the City Council; if this is so, I think it should be exercised.

I am in favor of rapid transit, and believe that the change in motive from horse power to the cable and electricity will greatly benefit this community. At the same time I think that some consideration should be given to the rights and privileges of those who use the streets with horse vehicles; in other words, that only single tracks should be laid on those business thoroughfares which are not of sufficient width to accomodate double tracks without greatly inconveniencing the public.

In other cities where the thoroughfares are narrow, the railroads are compelled to use paralled streets for their up and down traffic.

After paying nearly six hundred thousand dollars to open Douglas street as an east and west thoroughfare, we find that three squares of the street, that is from North to Charles, will be almost blockaded by the double tracks of this railroad company.

This matter, in my judgment, demands the immediate attention and consideration of your honorable body.

Provision should also at once be made for constructing a new bridge over the falls on the line of Baltimore street. This is required by the widening of the Baltimore street "narrows."

I direct your attention to this matter, in order that the cabling of the City Passenger Railroad Company on our main thoroughfare may not be unnecessarily delayed. Plans and specifications have been prepared in the City Commissioner's office, and an ordinance will be submitted, authorizing the work to be promptly proceeded with. It is proposed to carefully store the material in the old bridge so that it may be utilized in some other locality.

Yours very respectfully,

FERDINAND C. LATROBE, *Mayor.*

NEWS ITEMS AND EDITORIAL,

FROM THE BALTIMORE SUN.

Tracks on Lexington Street.

The Lake Roland Elevated Railway Company has commenced to lay double tracks on Lexington street west of North street. The street has been torn up as far as Calvert street and the rails placed in position. The tracks are laid on the south side of the street, the most southerly rail being within two feet of the pavement. This is according to the plan proposed by the company, to which Mayor Latrobe objected.

The Mayor requested a conference with the Federel officials in the post-office building. Postmaster Johnson, who has general supervision of the building, was in New York. United States Marshal Airey called upon the Mayor, who suggested that the Federal authorities could apply for an injunction to stop the work on the ground that the tracks would interfere with the mail carts going to and from the post office. Marshal Airey said he would confer with Postmaster Johnson upon his return from New York.

Under the ordinance authorizing the building of the road, the company has the right to lay double tracks, and the Mayor stated that the city cannot stop the work until an ordinance is passed by the City Council limited the company to one track.

The Mayor sent the following letter to Mr. James L. McLane, president of the company:

I notice that your company has commenced laying a double track on Lexington street between North and Calvert streets. I wish to inform you that, as I had already indicated, I think the public interest requires that no more than a single track should be laid on that portion of Lexington street. The city law officers have informed me that it is competent for the City Council to pass an ordinance prohibiting the laying of a double track there. At the next session of the council an ordinance will be introduced prohibiting your company from laying double tracks on the portion of Lexington street between North street and the east side of Calvert street. I write this to prevent your going to the unnecessary expense of laying a system of double tracks and afterwards being required to remove them.

BALTIMORE, FRIDAY, *March* 17, 1893.

The rights of the city sustained.—The decision of the Maryland Court of Appeals in the case of The Lake Roland Elevated Railway Company *vs.* The Mayor and City Council of Baltimore and Alfred F. Smyrk, City Commissioner, while for the most part merely the declaration of well-established legal principles, has just now an especial value and importance owing to the peculiar local conditions which have arisen in the development of street-railway enterprises in this city. The question at the issue in this case was the legal right of the city to revoke the privilege which it had granted to the company of laying double tracks on East Lexington street between North and Charles. The city claimed that the ordinance which authorized the laying of two tracks on Lexington street only granted a license, and not a charter right or franchise, and that this license was therefore revocable. It maintained, moreover, that it was invested with full power and control over its streets, especially in the matter of laying railway tracks, and that in the exercise of its police power it had authority to prohibit the double tracks on Lexington street as hostile to public safety and convenience. The company contended that the ordinance em-

powering it to lay double tracks created an irrepealable contract which gave it a vested right in the use of East Lexington street between the points mentioned. The Court of Appeals in sustaining the city's rights to limit the company to single tracks between North and Charles streets upholds in the strongest manner the principle of municipal control over its streets and highways. It is not, in fact, merely a power, but a duty of which it cannot get rid. The control of the city over the streets, says the Court, "is attended with the duty of preserving them for their legitimate purposes. They are intended for the passage of the people over them, on foot, or horseback and in vehicles, in their various occasions of business, convenience and pleasure. It is not competent for the city to defeat the primary purpose for which they were dedicated to the public use. They are highways and must be maintained as highways so long as they are kept in existence. The power over the streets is held on the same trusts as the other legislative powers conferred on the Mayor and City Council. It is intended to be used for the purpose of preserving them in the character of streets in such condition as may be most suitable for the public use." If an ordinance cannot be repealed which would seriously impair, if not virtually destroy, such use, then, says the Court of Appeals, "the City Council has lost all control over the streets and has renounced its legislative power."

Although the Court took occasion to say, with some emphasis, in answer to comment upon the supposed unfavorable effect on the interest of other railway companies of a decision in favor of the city, that it was only dealing with the case before it, and that it would protect vested rights by all the powers at its command, the general principles which it announces may be found applicable to other streets of the city besides Lexington and to other railway companies besides the Lake Roland corporation. There can be no desire in any quarter to interfere with vested rights, corporate or individual, which were lawfuly vested and which do not interfere with public rights, nor any disposition to obstruct or impede enterprises which are meritorious in themselves and which will add to the general comfort and convenience. The people of Baltimore have borne so cheerfully what would have been condemned in other cities

as intolerable nuisances and encroachments that they cannot be accused of lack of patience in their dealings with corporations. But they had begun to feel of late that under certain conditions patience might cease to be a virtue, and that it was important to have clearly established the rights which belonged to them and those which may properly be claimed by the various corporations to which street privileges have been conceded. The decision of the Court of Appeals in the Lake Roland railway case, therefore, will be hailed with satisfaction as a timely and authoritative declaration which sweeps away the fogs and mists that somehow seem to have obscured the view even in official circles and takes us back to first principles. These first principles, which would appear to have been forgotten in some quarters, as they are denied in others, are that the streets are primarily intended for public highways, and that they must be maintained for that purpose, and that any use inconsistent with that purpose can be prohibited and prevented by virtue of the police power with which the city is clothed. In the face of this decision there can be no room for further doubt, either as to the general duty or authority of the city with regard to its streets. It not only has the power, says the Court of Appeals, to protect the public in its right to their safe and convenient use, but it is a trustee clothed with a solemn duty in the premises which it not only cannot carelessly ignore, but of which it cannot deliberately divest itself. No little credit for the result which has been accomplished is due to City Counsellor Hayes, whose brief in the case was exceptionally able and exhaustive.

Endorsed; Editorial "Baltimore Sun," March 17, 1893. "Exhibit A."

RAILWAY ACT.

(1876, Chapter 242, Sections 13 and 14. Codified as Article 23, Sections 169 and 170, P. G. L.)

SECTION 13. And be it enacted, That if it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley or public way, or ground of any kind, or any

part thereof, it shall be competent for the municipal or other corporation, or public officer, or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such road, street, alley or other public way or ground, such company may appropriate so much of the same as may be necessary, for the purposes of such road, in the same manner and upon the same terms as provided for the appropriation of the property of individuals by section 167 of this Article; provided, that every railroad company laying down any such track or tracks upon any such public street, road, alley or other public ground, shall be responsible for injuries done to private property by such location lying upon or near to such public ground, which may be recovered by civil action brought by the owner or owners at any time within two years from the completion of such track or tracks, before the proper Court; *and provided further, that no railroad company shall be allowed to pass through the city of Baltimore without the consent of the municipal authorities.* (Section 169, Art. 23, P. G. L.)

SECTION 14. And be it enacted, That such corporation may demand and receive for the transportation of passengers on said road, not exceeding three cents per mile, and for the transportation of property on said road other than coals, ores, or other minerals, not exceeding five cents per ton per mile; but such corporation shall not demand or receive, for the transportation of coals, ores, and other minerals, a rate not exceeding one and a half cents per ton per mile. (Section 170, Article 23, P. G. L.)

See Opinion of Court of Appeals of Maryland, delivered July 13, 1882, which declared and decided these sections did not relate to street railways in Baltimore city.

Hodges vs. Balto. P. Ry. Co. 58 Md. 622.

See also Brief, 23-26, and Review of Judge Goff's Decision in same.

Office Supreme Court, U. S.
FILED.
JAN 19 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

No. 209. OCTOBER TERM, 1896.

Appeal from the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Appellant.

vs.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, TRUSTEE,

Appellee.

BRIEF FOR APPELLEE.

JOHN N. STEELE,
JOHN E. SEMMES,
FRANCIS K. CAREY,
E. J. D. CROSS,
Solicitors for Appellee.

IN THE

SUPREME COURT of the UNITED STATES.

No. 209. OCTOBER TERM, 1896.

Appeal from the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Appellant.

vs.

THE BALTIMORE TRUST AND GUARANTEE COMPANY, TRUSTEE,

Appellee.

BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

The Bill of Complaint in this case was filed by the Baltimore Trust and Guarantee Company, a corporation of the State of Maryland, against the Mayor and City Council of Baltimore. The Bill prays that the municipal corporation may by injunction be restrained from interfering with the Lake Roland Elevated Railway

Company "in the construction and maintenance of two tracks on Lexington street, between Charles street and North street, and the operation of the cars of the said Lake Roland Company thereupon."

On September 1st, 1892, the Lake Roland Elevated Railway Company executed and delivered to the Baltimore Trust and Guarantee Company, as Trustee, a mortgage of its railway property and franchises, for the purpose of securing the payment of the principal and interest of one thousand first mortgage coupon bonds, of the denomination of one thousand dollars each.

The Lake Roland Elevated Railway Company (which will hereafter be referred to as the Lake Roland Company) was formed and organized under the laws of the State of Maryland, under an agreement of consolidation between the North Avenue Railway Company of Baltimore city, (which will hereafter be referred to as the North Avenue Company) and the Baltimore, Hampden and Lake Roland Railway Company, both of said constituent corporations being also corporations of the State of Maryland, duly incorporated under the laws of said State; the said Baltimore, Hampden and Lake Roland Railroad Company having been originally incorporated by the General Assembly of Maryland, by chapter 285 of the Acts of 1872, which Act was revived by the said General Assembly by chapter 232 of the Act of 1892; and the said North Avenue Company having been duly incorporated and organized under the General Corporation Laws of the State of Maryland, by the filing of a Certificate of Incorporation with the Secretary of State, of the State of Maryland, on the seventh day of May, in the year eighteen hundred and eighty-nine.

By the Act of 1890, chapter 217, the General Assembly of Maryland authorized the North Avenue Company to lease, purchase or aid other railways.

The second article of the Certificate of Incorporation of the North Avenue Company states that it "is a corporation for the purpose of constructing and running a passenger railway in the City of Baltimore." (Record, page 75.)

Section 169 of Article 23 of the Code of Public General Laws of the State of Maryland provides: "that no railroad company shall be allowed to pass through the City of Baltimore without the consent of the municipal authorities," and the North Avenue Company applied to the appellant for the purpose of obtaining the consent of the municipal corporation to the use of certain streets of the City of Baltimore, including the right to lay and maintain double tracks on Lexington street, from North street to Charles street, for the purpose of reaching its proposed terminus at the corner of Charles and Lexington streets.

On April 8, 1891, the Mayor approved an ordinance, passed by both Branches of the City Council, known as Ordinance No. 23, and entitled "An Ordinance to authorize the construction of city passenger railway tracks by the North Avenue Railway Company of Baltimore city on North avenue, from McCulloh street to Guilford avenue, and thence on Guilford avenue and North street to Lexington street, and thence on Lexington street to Charles street, and on North street to the north side of Fayette street." (Record, page 58.)

By the first section of this Ordinance the North Avenue Company was authorized:

"To lay down and construct double iron railway tracks, for the purposes of its business, and in connection with double tracks now authorized to be constructed by it on North avenue to McCulloh street, beginning with said extension on North Avenue, at its intersection with the east side of McCulloh street, the present terminus of the tracks of the said company, as heretofore authorized, and running thence on North avenue

eastwardly to Guilford avenue, and running thence on Guilford avenue and North street southwardly to the intersection of North street with Lexington street, and thence on Lexington street westwardly to Charles street, and on North street southwardly to the north side of Fayette street."

This right to construct double tracks on Lexington and other streets was given upon the following express conditions, to the performance of which the North Avenue Company became bound by the acceptance of the Ordinance, and the Lake Roland Company became bound by virtue of the agreement of consolidation under which it succeeded to all the corporate rights and franchise of the North Avenue Company:

(*a.*) That the North Avenue Company should permit other railways to use its tracks upon certain conditions. (Section 2.)

(*b.*) That it should carry over its lines free of charge, passengers who present transfer tickets from any other city passenger railway company with which it connects, and which will transfer free with it. (Section 4, Subsection 3.)

(*c.*) That it should at all times keep the spaces between its tracks, and two feet on each side thereof, in good repair; and whenever any portion of any street upon which its tracks shall be laid shall be repaved, it should be required to pay the entire expense of paving such spaces with such pavement as the Mayor and City Council should prescribe. (Ibid, sub-section 4.)

(*d.*) That it should permit all electric light, telephone, telegraph or other wires on North street to be strung on its elevated structure. (Section 5.)

(*e.*) That it should be liable for the payment of the Park Tax of nine per cent. upon its gross receipts. (Section 7.)

(*f.*) That the Mayor and City Council of Baltimore should have the privilege, within two years after the

expiration of fifteen years from the date of the passage of the Ordinance, to purchase the stock and interest of the said company with such appurtenances as the municipal corporation should think proper.

Before the Lake Roland Company could begin the erection of its elevated railway on North street, which was the connecting link between its east and west line on North avenue, and its east and west line on Lexington street, it was necessary for it to obtain the ratification of Ordinance No. 23, so far as it related to said elevated railway, and by the Act of 1892, chapter 112, the General Assembly of Maryland, after reciting that "before the said North Avenue Railway Company of Baltimore City can elevate its tracks on North Street, as aforesaid, it is required by law that the sanction of the General Assembly of Maryland should be given to said Ordinance, so far as it relates to said elevation of its tracks," proceeded to enact as follows:

"*Be it enacted by the General Assembly of Maryland*, Section 1. That Ordinance No. 23, of the Mayor and City Council of Baltimore, approved April 8, 1891, be, and the same is hereby ratified and confirmed; this ratification to have the same effect as if the Mayor and City Council of Baltimore, at the time of the passage of said Ordinance, had been fully authorized by the General Assembly to pass said Ordinance, and to grant each and all of the powers and privileges therein contained; the said Mayor and City Council to have the same power and control hereafter, in reference to the enforcement, amendment or repeal of said Ordinance, as it has, or would have, in respect to any Ordinance passed under its general powers."

The construction of the tracks authorized by Ordinance No. 23 was begun by the North Avenue Company, and, after the passage of the Act of 1892, Chapter 112, and the execution of the agreement of consolidation, the Lake Roland Company at once proceeded with great

diligence to construct the entire system of the consolidated company, about fourteen miles in length, which included the elevated railway system on North street, about four-fifths of a mile in length.

On August 3, 1892, the Board of Directors of the Lake Roland Company made a contract for the construction of the road, by which they agreed to pay to the contractors one million of dollars in first mortgage bonds and one hundred thousand dollars in cash, which contract was duly ratified by the stockholders. After the execution and record of the mortgage, all of the bonds were duly executed, certified to by the Baltimore Trust and Guarantee Company as Trustee, and left with the Trustee for delivery to the contractors. (Record, page 215.)

This mortgage conveyed to the Trustee all the rights and franchises of the Lake Roland Company and included in terms the right to lay double tracks on Lexington street from North to Charles street. The affidavit of Edward H. Bouton, the Secretary of the Lake Roland Company, explains in detail this construction contract and declares that the proposition was made by the Lake Roland Company and accepted by the contractors, "with the expectation that said railway company could reach its terminus at the corner of Charles and Lexington streets by double tracks, and that part of the security of said bonds was the right to maintain and operate double tracks on Lexington street."

After the Lake Roland Company had practically completed its entire railway system, including its elevated structure, its car barn and power station, and had provided its equipment, at an outlay of over a million dollars, and after it had laid down double tracks on Lexington street from North street to Charles street, the Mayor and City Council of Baltimore passed an Ordinance, known as Ordinance No. 1, approved November 18, 1892, the first section of which read as follows:

"*Section 1. Be it enacted and ordained by the Mayor and City Council of Baltimore*, That the first section of Ordinance No. 23, approved April 8th, 1891, so far as the same authorized and empowered the North Avenue Railway Company to lay double iron railway tracks upon the portion of east Lexington street, between North street and Charles street, be and it is hereby repealed, and that the authority and license given to said North Avenue Railway Company by said first section of said Ordinance to lay such double iron railway tracks, be, and it is hereby revoked."

By the second section of the same Ordinance, the Lake Roland Company was required to remove all of its tracks from Lexington street within ten days after notice from the City Commissioner, and in default of such removal the City Commissioner was authorized to remove them himself.

By the third section of the same Ordinance, the Lake Roland Company was authorized to maintain one railway track on Lexington street, with the proviso that it should be a condition precedent to the exercise of the right to said single track given by said third section, that the Lake Roland Company should remove its double track within twenty days from the passage of the Ordinance.

The City Commissioner gave the ten days' notice to the Lake Roland Company provided for in the second section, requiring the company to remove its tracks from Lexington street, and the Lake Roland Company thereupon filed a bill in the Circuit Court of Baltimore City asking for an injunction. The municipal corporation filed an answer, testimony was taken, and the case taken directly to the Court of Appeals, by agreement, on a *pro forma* decree refusing the injunction. After argument the Court of Appeals affirmed the decree of the Circuit Court.

After the decision of the Court of Appeals, the municipal corporation notified the Lake Roland Company

that by the terms of Ordinance No. 1, the Lake Roland Company had forfeited its right to lay or maintain the single track which the Ordinance permitted, and that it must either remove all of its tracks on Lexington street, or else apply to the Mayor and City Council for a new Ordinance.

This notice was accompanied with a statement from Mayor Latrobe that the City Council would probably require the company to remove its principal office from Baltimore county to Baltimore city, as a condition of the grant of a right to a single track. (Affidavit of F. C. Latrobe, Record, page 197.)

At this juncture the Baltimore Trust and Guarantee Company, as Trustee for the bondholders, intervened for their protection, and filed a bill in the Circuit Court of the United States, alleging that "this bill is filed in the interest, for the protection, and at the request of all of said bondholders (all of whom reside out of the State of Maryland,) for the purpose of protecting them from an irreparable injury, which, as above shown, is about to be done to the said Lake Roland Company, to whose property and franchises the said bondholders and your orator can alone look for the payment of the principal and interest of said bonds." The bill asked for an injunction, and the decision of the Circuit Judge being in favor of the plaintiff, and a decree being passed perpetually enjoining the Mayor and City Council of Baltimore from interfering in any manner with the said Lake Roland Company in the construction and maintenance of double tracks on Lexington street, the municipal corporation appealed to this Court.

II.

Argument.

The North Avenue Railway Company was lawfully incorporated and organized as a city passenger railway company under the General Railway Act.

Before constructing railway tracks upon the streets of the city of Baltimore, it was by section 169 of the General Railway Act required that it should obtain the consent of the Mayor and City Council of Baltimore, which consent could be given or withheld by the municipal corporation, at its discretion.

In pursuance of this legislative authority, the Mayor and City Council of Baltimore passed the Ordinance known as Ordinance No. 23, approved April 8th, 1891.

By the terms of this Ordinance, the North Avenue Company was authorized to lay and maintain double tracks on Lexington street, between North street and Charles street.

The Ordinance in question, in granting the franchises to the North Avenue Company, which included the Lexington street tracks, imposed upon the North Avenue Company a number of public duties, to which the North Avenue Company became bound by the acceptance of the Ordinance.

The Ordinance was duly accepted by the North Avenue Company, and all of the terms and conditions imposed upon the North Avenue Company have been faithfully fulfilled by the North Avenue Company, and its successor, the Lake Roland Company.

The Ordinance constituted a contract between the State of Maryland, acting through the Mayor and City Council of Baltimore, and the North Avenue Company, the terms of which contract were binding upon both parties.

By Ordinance No. 1, approved November 18, 1892, the Mayor and City Council repealed Ordinance No. 23, so far as it authorized double tracks on Lexington street, after such tracks had been laid.

There was no change in the physical condition of Lexington street between the date of the passage of Ordinance No. 23 and the passage of Ordinance No. 1.

Ordinance No. 23 contained no reservation to the Mayor and City Council of a right to repeal the provision relating to double tracks on Lexington street.

The State Legislature has neither repealed the right itself nor authorized the municipal corporation to repeal it. The repealing ordinance is not the exercise of the police power of the city.

The Ordinance of November 18, 1892, by which the Mayor and City Council of Baltimore attempted to revoke the rights granted by Ordinance No. 23, approved April 8, 1891, to the North Avenue Company, to lay and maintain double tracks on Lexington street, was passed under "supposed legislative authority" which was deemed vested in the municipal corporation by virtue of the Act of the General Assembly of 1890, Chapter 370, which authorized the municipal corporation to regulate the use of its streets by railway tracks.

The repealing Ordinance was, therefore, an attempt to impair the obligations of a contract, in violation of the tenth section of the first article of the Constitution of the United States, and should be declared void and inoperative.

III.

JURISDICTION.

(*A.*) *Standing of the Trustee.*

A trustee under a railway mortgage, before default, has the right to maintain a bill for the purpose of protecting the security of the bonds from alleged illegal interference.

Jones on Corporation Bonds and Mortgages, Sec. 294.
Railroad Commission Cases, 116 U. S., 397.
Murdoch vs. Woodson, 2 Dill., 188, 203.

In Murdoch vs. Woodson (*supra*) Judge Dillon says:

"The Trustees in a railway mortgage for the benefit of numerous and widely scattered bondholders secured thereby, have sufficient authority to enable them to bring a bill in equity to enjoin in an alleged illegal proceeding, which will injure the value of the bonds and cast a cloud upon the security."

(*B.*) *The Federal Question Involved.*

If the repealing Ordinance was an attempt on the part of the State to impair a contract, there is, of course, a case made out arising under the Constitution of the United States, and the right of the Court to entertain the suit is clear. The jurisdiction attaches as well in the case of a City Ordinance passed "under supposed Legislative authority" as in the case of a direct Act of the General Assembly of the State.

Judiciary Act of March 3, 1887, Section 1, printed in Appendix to 120 U. S.

Hamilton Gaslight Company vs. Hamilton City, 146 U. S., 258, 266.

Saginaw Gas Light Co. vs. City of Saginaw, 28 Fed. Rep. 529.

Weston vs. City of Charleston, 2 Peters, 462.

Jefferson Branch Bank vs. Skelley, 1 Black, 436.

Wright vs. Nagle, 101 U. S., 791, 793, and cases cited.

Wo Lee vs. Hopkins, 118 U. S. 356, 359.

In the case of the Saginaw Gaslight Company vs. The City of Saginaw (*supra*), the proof showed that the City of Saginaw, under the power to *consent* and *regulate*, given in a general Incorporation Act, had, by Ordinance, authorized the plaintiff corporation to lay gas mains, and given it the exclusive right to light the streets by gas, which Ordinance was accepted and acted upon. Subsequently the City of Saginaw passed an Ordinance authorizing the Fort Wayne Jenny Electric Light Company to

erect a plant, etc., and light the streets with electricity. The gas company claimed that the first Ordinance constituted a contract between it and the municipal corporation, and that the subsequent Ordinance was an impairment of it, and against the Constitution of the United States. The first question made was in regard to jurisdiction, on the ground that the Federal Constitution only prohibited the "State" from passing laws impairing the obligations of contracts. The Court says: "But if the authority exercised be that of the State itself, whether acting directly through its Legislature or indirectly through a subordinate body, to which the Legislature has delegated a portion of its powers, it is competent for this Court to inquire whether it has exceeded its authority and violated the constitutional provision in question."

(*C.*) *The State Decision.*

The decision of the Court of Appeals of Maryland in the case of the Lake Roland Elevated Railway Company vs. Mayor and City Council of Baltimore, 77 Md, 352, has no relation to the case at bar. It does not present any question of *res adjudicata*, because neither the bondholders nor their Trustees were parties to that case. They were not represented in it in any way, nor could they have been represented if they had desired to be made parties. Nor is this Court bound in any way by the interpretation placed by the Court of Appeals of Maryland upon its own statute in reference to the Federal question involved.

State Bank of Ohio vs. Knoop, 16 How., 369, 391.
Wright vs. Nagle, 101 U. S., 791, 793.
Cooley, Const. Law, 132, 133.

Thus, in the case of the State Bank of Ohio vs. Knoop, (*supra*,) the Supreme Court of the United States says:

"The rule observed by this Court to follow the construction of the statute of the State by its Supreme Court is strongly urged. This is done when we are required to administer laws of the State. The established construction of the statute of the State is received as part of the statute. But we are called in the case before us not to carry into effect a law of the State, but to test the validity of such a law by the Constitution of the Union. * * The decision of the Supreme Court of the State is before us for revision, and if their construction of the contract in question impairs its obligation, we are required to reverse their judgment. To follow the construction of the State Court in such a case would be to surrender one of the most important provisions in the Federal Constitution."

So, also, in the case of Wright vs. Nagle, (*supra*,) Mr. Chief Justice Waite, delivering the opinion of the Court, says:

"We think, also, that the motion to dismiss must be overruled. It is true, the Court below disposed of the case by deciding that the State statutes did not authorize the inferior Court to grant Miller an exclusive right to maintain bridges within the designed limits, and that in so doing it gave a construction to a State statute. It is also true that ordinarily such a construction would be conclusive on us. One exception, however, exists to this rule, and that is, when the State Court has been called upon to interpret the contract of States, 'though they have been made in the form of law,' or by the instrumentality of a State's authorized functionaries, in conformity with State legislation."

So, Judge Cooley, (*supra*,) after setting out the general rule that upon questions "of the construction, operation or force of any provision of the State Constitutional Law * * * the decision of the State Court will furnish the rule of decision for the Federal Court, says:

"But there are certain cases in which this rule cannot be applied, because the reasons on which it rests are inapplicable.

It cannot, for example, be applied in any case where the decisions of the State Court involved a question of national authority, or any right, title, privilege or exemption derived from or claimed under the Constitution, or any law or treaty of the United States. * * * Nor are State decisions upon the validity or construction of a State statute, binding when the statute is in the nature of a contract, and private rights have accrued under it."

IV.

ORDINANCE No. 23, APPROVED APRIL 8, 1891, WAS A CONTRACT PROTECTED BY THE CONSTITUTION OF THE UNITED STATES.

The appellee relies upon the following

PROPOSITION.

Ordinance No. 23 is not, as claimed by the appellant, a revocable permit, subject to alteration, amendment or repeal at the whim of the Mayor and City Council, but the passage of the Ordinance, and its acceptance by the North Avenue Company, constituted a contract, under the protection of the Constitution of the United States, the terms of which could not be altered by the municipal corporation without the consent of the company, except in so far as the municipal corporation actually reserved, in the Ordinance itself, the right to alter said terms; for which reason the repealing Ordinance of November, 1892, not being an attempt to exercise any reservation, but seeking to make a serious alteration of one of the terms of the said contract, to wit, the right to lay double tracks on Lexington street, is in violation of the Constitution of the United States, and is void.

The appellant does not believe it necessary to cite authority to support this proposition. That a legislative grant when accepted and acted upon, whether made directly by the Legislature or indirectly through a municipal

corporation or other State agency, does in fact constitute a contract between the State and the grantee, has been the doctrine of the Supreme Court of the United States almost from its organization. It was announced in the Dartmouth College case in 1819, and has been re-affirmed by not less than seventy-six decisions of the Supreme Court, ending with its complete recognition in the case of the City of St. Louis, Plaintiff in Error vs. The West. Union Tel. Co., decided by the Supreme Court as late as March 6, 1893.

Darmouth College vs. Woodward, 4 Wheat, 518.

City of St. Louis, Plaintiff in Error, vs. The West. Union Tel. Co., 148 U. S., 92

Sioux City Railway Co. vs. Sioux City, 138 U. S., 98.

Greenwood vs. Freight Co., 105 U. S., 13.

Railroad Co. vs. Richmond, 96 U. S., 521.

Railroad vs. Delamore, 114 U. S., 510.

New Orleans Gas Light Co. vs. New Orleans, 115 U. S., 650.

Saginaw Gas Light Co. vs. City of Saginaw, 28 Fed. Rep. 529.

Coast Line R. R. Co., vs. City of Savannah, 30 Fed. Rep., 646.

City of Burlington vs. The Burlington Street Railway Company, 49 Iowa, 144, 147.

New Orleans vs. Telephone & Telegraph Co., 40 La. An., 41.

Kansas City vs. Corrigan, 86 Mo., 67.

In the case of the City of Burlington vs. The Burlington Street Railway Company, (*supra*) which was cited and distinguished by the Supreme Court of the United States, in the case of the Sioux City Railway Company vs. Sioux City, (*supra*) the following facts were presented:

The City of Burlington, acting under its *general powers*, passed an Ordinance, the fifth section of which authorized the Burlington Street Railway Company "to lay single or double tracks" on certain streets. By the Ordinance the city reserved "the right, by proper police rules and regulations to govern and control the movement of cars, their speed, places of stoppage, and all other matters and things within the purview of the proper and good government of said city, and which tend to promote the safety and comfort of the passengers and citizens of said city." Under this Ordinance the company laid a *single* track upon Division street. Subsequently the city repealed section five of the Ordinance, and forbade the laying of double tracks, but authorizing the single track as laid to be maintained with proper switches, &c. Thereupon the company, relying upon its original authority to lay double tracks, proceeded to lay double tracks on Division street. The city applied for an injunction, and, in answer to the petition, the company showed that it had "expended a large sum of money in building and operating its street railway; that the double track as proposed to be constructed, was necessary for the convenience, speed and safety of the traveling public; that under the Ordinance, as it originally stood, the company had the right to build the double track, and the right cannot be taken away by amendment, or change of the Ordinance." The Supreme Court of Iowa on this state of facts said:

"The Ordinance as adopted gave the defendant authority to lay the double track in controversy in this case. Under this Ordinance the defendant expended large sums in the construction of its railway. The Ordinance constitutes a contract whereby the defendant is secured in the exercise of the powers conferred therein. If it had not this effect the defendant would have no security that its property would not be destroyed by unfriendly legislation by the City Council. The law will secure to the defendant the exercise of all the powers conferred

by the Ordinance. The City cannot, without the consent of the defendant, change the terms of the contract entered into by the Ordinance nor abrogate nor nullify it. The amendment, therefore, which attempts to take from the defendant the right to lay a double track cannot have the effect intended and will deprive the defendant of no right guaranteed by the original Ordinance."

The above case (like the case of State vs. Corrigan Street Railway Company, *supra*) shows a contract made by a municipal Ordinance passed under the implied powers of the city.

The following is one of the many cases which give the effect of an inviolable contract to an Ordinance passed by a city under the *consent* clause of a general incorporation Act.

The case of New Orleans vs. Telephone and Telegraph Co., (*supra*,) is cited with approval by the Supreme Court in the case of the City of St. Louis vs. The Western Union Telegraph Company. The General Incorporation Law of the State of Louisiana authorized the formation of telegraph and telephone companies, with power to erect and maintain their poles "along the streets of any city, *with the consent of the Council or trustees thereof.*" The Mayor and City Council of New Orleans passed an Ordinance authorizing the Telephone and Telegraph Company in question, which was formed under this General Incorporation law, to erect and maintain certain poles along certain streets. Subsequently a general Ordinance was passed by the City Council, subjecting all telegraph and telephone poles to a charge of five dollars per annum. The company resisted the charge and set up its contract rights by virtue of the special Ordinance. After declaring that "it is not seriously contended that the provision is a police regulation," the Court says:

"The only remaining question is, whether, after granting the defendant the authority to construct and maintain its lines without limitation as to time, and with no other consideration than the furnishing of certain free telephone facilities to the city; after the defendant has, at great expense, established its plant and constructed its lines, and when it has fully complied with all the conditions imposed, the city can now exact this large additional consideration for the continued enjoyment of privileges already granted. If the city can do this now, she could have done it on the very day after the defendant had completed its lines, when it had incurred all the expense, and before it had reaped a particle of the return. If she can impose a charge of $5 a pole, she can, with equal power, impose one of $1,000, and for that matter, she could arbitrarily revoke the grant at her pleasure. Either she is bound according to the terms of her proposition, accepted and acted upon by the defendant, or she is not bound at all. Obviously, and upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous conditions therein. Such has been the well recognized doctrine of the authorities, since the Dartmouth College case, 4 Wheat. 518."

The attempt of the appellant and of the Court of Appeals to avoid the force of this case by claiming that the city of New Orleans has unusual rights over its streets, is not founded on fact. It is true that the City of New Orleans is authorized to sell *railway* franchises, but this right has nothing to do with telephone companies, as the Court will see from the above abstract of the case.

V.

LEGAL POSITIONS OF APPELLANT.

The legal positions taken by the appellant, may be briefly presented, as follows:

A.

Ordinance No. 23 is a Revocable Permit.

The appellant seems to have been sustained by the Court of Appeals of Maryland, in the case of Lake Roland Elevated Railway Company vs. Mayor and City Council, 77 Md. 354, in the extraordinary claim made in the answer of the appellant filed in this case.

Thus the ninth paragraph of the answer uses the following language:

"This defendant avers that, in no sense, was Ordinance No. 23 a contract between the defendant and the North Avenue Company, but was only a license granted to the North Avenue Company to use the specified streets of the defendant, subject to revocation at the will and pleasure of the legislative department of the defendant. That if the defendant were to make such a contract as is set forth in the ninth paragraph of said bill, or any other irrepealable contract of the kind, it would be *ultra vires* and null and void."

Judge Bryan, delivering the opinion of the Court of Appeals in the case referred to, says: "We hold that Ordinance No. 23 did not vest in the Lake Roland Company an irrevocable right in the streets." Chief Judge Alvey, in delivering a separate opinion on the motion for re-argument, says:

"The power to maintain and regulate the use of the streets of the city is a trust for the benefit of the general public. * * * The Mayor and City Council cannot vest themselves of this trust. * * * The power vested in them in respect to the streets is of legislative character; and they can neither restrict themselves nor their successors by any irrepealable Ordinance in the exercise of such power over the streets, except it be by the express authority of the Legislature of the State."

The appellee claims that the cases cited by the appellee show that this position is not only opposed

to the established doctrine of this Court, but that it is wholly without support in any other adjudicated case, which the industry of the counsel for the appellant has been able to discover.

It is true that there is a class of cases which seem to hold that the general powers of a municipal corporation, are not sufficient to authorize it to pass an Ordinance giving to one corporation the *exclusive* right to build railroads or electric light or gas plants in a city, and that express legislative authority is necessary to support such an ordinance, but such decisions have manifestly no bearing on the case at bar.

It is true also that another class of cases seem to hold that the general powers of a municipal corporation are not sufficient to support any irrevocable grant, but that such a grant must be based upon an express power from the General Assembly.

As the General Railway Act confers this express power, this class of cases also clearly have no relation to the case at bar.

The only decisions cited in the opinion of the Court of Appeals, in support of the proposition that the city of Baltimore is incapable of making a contract, by an Ordinance, for the exercise of corporate franchises, are the cases of Rittenhouse vs. Mayor, &c., 25 Md., 337, and State vs. Graves, 19 Md., 351. The learned Circuit Judge uses the following language in his opinion in regard to these two cases:

"I have examined them carefully, considering the facts in each in connection with the opinions of the Court relating thereto, and I am convinced that it was not the intention of the Court of Appeals to hold as the defendant here claims, but that it really designed to and did announce the now well-established doctrine that municipal corporations, so far as their own internal affairs are concerned—such as opening, closing, and grading streets, or constructing buildings for public use in a

particular manner or at a certain place—can pass no irrepealable Ordinance. The Court in those cases did not regard the Ordinances as contracts, but considered them municipal enactments or regulations repealable at the pleasure of the city, as the public interest might demand."

It must certainly be conceded that Ordinance No. 23 was passed for the purpose of giving "the consent of the municipal authorities," to the construction of tracks by the North Avenue Company, in the streets of the city, under section 169 of Article 23 of the Code of Public General Laws, which is part of the General Railway Act, under which the North Avenue Company was incorporated.

Oler vs. Randallstown Railroad, 41 Md., 583.
Koch vs. North Avenue Co., 75 Md., 222, 224.
Garrett vs. Lake Roland Co., 79 Md., 277, 287.
Webster vs. Lake Roland Co., 81 Md., 529, 535.

In an elaborate supplemental brief on behalf of the municipal corporation, filed with Judge Morris and Judge Goff, the appellant strenuously argued that it had been decided by the Court of Appeals of Maryland, in the case of Hodges vs. Baltimore Union Passenger Railroad Company, 58 Md., 603, 622, that the provision of the General Railroad Act, under which the North Avenue Company was incorporated, which requires the consent of the municipal authorities to be obtained before such a corporation can lay tracks in the city of Baltimore, (Article 23, section 169) applies only to *steam* railways, and has no bearing upon, or relation to *street* railways incorporated under the General Railway Act.

From this argumant was deduced the conclusion that Ordinance No. 23 was not passed for the purpose of giving the consent of the municipal authority to the construction of tracks, and the operation of cars by the

North Avenue Company in the streets of Baltimore, but was simply a license granted under the implied powers of the city.

In the original brief filed below, the appellant had taken precisely the opposite position, in the following language, (appellant's printed brief below, page 11 :)

"The North Avenue Company is incorporated under the General Railroad Incorporation Act of Maryland, (Code, Article 23, sections 158-204.) In this general act of incorporation there is an express provision prohibiting any railroad from occupying the streets of Baltimore without the *consent* of the municipal authorities (Code, Article 23, section 169.) The certificate of incorporation of the North Avenue Company, has the following single provision in it relating to the purpose of its creation: 'Of constructing and running a passenger road in the city of Baltimore, the whole of the line of said road being located in said city, and the termini of said road being therein.' It is, therefore, apparent that without the permission or consent of the city, the charter of the North Avenne Company would be of no avail, so far as rnnning the cars on the streets of Baltimore. This consent, as elsewhere shown, is only such a consent as the city is empowered, under its charter, to grant, that is a revocable license. Ordinance No. 23 gave the city's cousent in the nature of a license, as required by the Act. Not one cent was paid for the license, only governmental regulations imposed. Ordinance No. 1 modified this license, substituting one track and a switch for double tracks on East Lexington street, between North and Charles street."

After the appellee had filed its brief below, the counsel for the appellant quickly perceived that they had made an admission fatal to the whole theory of their defense, and therefore pressed the Hodges case upon the Circuit Court.

The appellant failed, however, to convince either Judge Goff or Judge Morris (who agreed upon this point) that there was any force in its position, although

neither the Garrett nor Webster cases (*supra*), had then been decided.

An examination of the Hodges' case will satisfy this Court that the Court of Appeals of Maryland did not intend to decide that Sec. 169 of Article 23 of the Code of Public General Laws did not apply to street railways.

It is true, that the Court of Appeals in that case, expressed its regret and surprise, that it had previously held in Oler's case, (*supra*,) that the General Railway Act applied to street railways, and permitted street railways to be incorporated under it, but the Court distinctly affirmed Oler's case in the Hodges' case. Thus, Judge Robinson says, that, but for the Oler case, the Court would have been disposed to hold that the Act did not apply to street railways. He declares that "few, if any, of its provisions have reference to railways of this character." As an illustration of this statement, Judge Robinson quotes secs. 13 and 14 of the General Railway Act, (codified as Sections 169 and 170 of Article 23,) and it is respectfully contended, only decides that, but for the Oler case, these provisions could not have been held applicable to street railways. They are referred to by the Court of Appeals, apparently for the purpose of showing that a street railway organized under the General Railway Act might find itself, under these sections, subject to harsh and confusing restrictions. So far as the section relating to the fare to be charged by railways is concerned, it is only necessary to say that the General Assembly has taken the precaution to provide in terms that a fare of five cents shall be charged by street railways in Baltimore city.

The appellant might with as much reason argue from the Hodges' case that *none* of the provisions of the General Railway Act apply to street railways, although it is settled beyond all controversy that its provisions do apply to street railways. Thus Judge Robinson says that "few, if *any*, of its provisions have reference to"

street railways. Of course he could have only meant to say that this would be the case but for the decision in the Oler case, which was not only followed in the Hodges' case, and in a great number of subsequent decisions, including the Koch case (*supra*), but which has controlled the organization of street railways in Maryland ever since.

The appellant is compelled to admit that the North Avenue Company was properly incorporated under the General Railway Act, as "a corporation for the purpose of constructing and running a passenger railway in the City of Baltimore." (Art. 2 of certificate of incorporation.) If now the appellant claims that the restriction of Sec. 169, which requires any railway corporation incorporated under the Act, to obtain the consent of the municipal authorities before using the streets of Baltimore, does not apply to the North Avenue Company, it necessarily follows that the North Avenue Company obtained a direct franchise from the Legislature to use the streets of Baltimore without such consent. It is certainly clear that no such right was intended to be conferred when the Court of Appeals decided that a street railway corporation could be legally formed under the General Railway Act.

But it is not necessary to rely upon this argument, because the Court of Appeals of Maryland has expressly decided that Section 169 does apply to the North Avenue Company, in the two cases of Garrett vs. Lake Roland Co., (*supra*) and Webster vs. Lake Roland Company (*supra*), both of which decisions were handed down after the decision of the Circuit Court of the United States. In the Webster case (*supra*, decided June 20th, 1895) the Court of Appeals had before it the suit of a livery stable keeper on North street near Lexington street, opposite the surface tracks of the Lake Roland Company, (laid under Ordinance No. 23) claiming damages for the erection of

the inclined approach to the elevated structure. The Lake Roland Company maintained that under Ordinance No. 23, it was only responsible for damages to property opposite the elevated structure. The Court of Appeals decided that inasmuch as the North Avenue Company was incorporated under the General Railway Act, and as section 169 of that Act (the section in controversy) "expressly enacts that the corporation shall be responsible for injuries done, by the location of its tracks, to private property lying *upon or near* to the street so occupied," the Lake Roland Company was responsible for damages to Webster, notwithstanding the fact that his property was not directly opposite the elevated tracks. The Court further says, still referring to section 169, in its relation to the North Avenue Company: "There is a further provision (not now in question) that no railroad company shall be allowed to pass through the city of Baltimore without the consent of the municipal authorities."

It can hardly be seriously argued, in view of this decision, that section 169 does not apply to the North Avenue Company.

It necessarily follows, therefore, that Judge Goff and Judge Morris were both right in their conclusion, about which they agreed, that the General Railway Act authorized the Mayor and City Council to consent to the use of the city streets by the North Avenue Company, and that Ordinance No. 23 was passed for the purpose of giving this consent.

It likewise follows that the Court of Appeals of Maryland, in rendering it decision, erred in assuming that Ordinance No. 23 was passed under the implied powers of the city, or under a mere right to regulate the use of the streets.

In this connection, the following language of the Court of Appeals, (Judge Bryan's opinion,) is instructive:

"We may say once for all, that we are dealing only with the case before us. Franchises and privileges granted by the Legislature, cannot be annulled by the Mayor and City Council."

Is it not too clear for argument, that in passing Ordinance No. 23, the Mayor and City Council of Baltimore were simply acting as the hand of the Legislature, under the express authority conferred by the General Railway Act? Can it be seriously contended, that after the municipal corporation has perfected the contract between the State and the railway corporation, by giving the requisite consent under the General Railway Act, it is competent for it to usurp the functions of the General Assembly and amend, alter or repeal a contract, which is only under the control of even the General Assembly itself, by virtue of its constitutional reservation?

B.

The Constitutional Reservation.

Much stress is laid by the Court of Appeals of Maryland upon the fact, that the General Railway Act, under which the North Avenue Company was incorporated, was passed after the adoption of the State Constitution of 1867, in which a right is reserved to the State to alter or amend the charter of all corporations afterwards incorporated.

The appellee has always conceded that the General Assembly of Maryland could lawfully amend, alter or repeal any of the corporate rights or franchises of the North Avenue Company under the constitutional reservation, and that if an Act of the General Assembly were now before this Court, making such alterations, amendment or repeal, no Federal question would be presented, because no contract would have been impaired.

No authority is necessary to determine that the municipal corporation has no right to exercise the Constitutional function of the General Assembly. The point has, however, been expressly decided.

State vs. Jersey City, 49 N. J. Law, 303, 305.
Citizens Ry. vs. Memphis, 53 Fed. Rep., 715.

It is equally true that no Federal question would be presented if the municipal corporation were assuming to exercise any of its reserved rights to amend, alter or repeal, which are contained in the Ordinance itself, but it is not pretended that the revocation of the Lexington street rights could be justified under any of the reservations in the Ordinance. Moreover, Ordinance No. 23 expressly declares in its seventh section that the company shall be subject to "all the other general *regulations* now existing, or hereafter to be made relating to city passenger railways, *not inconsistent with this Ordinance.*"

C.

Act of 1890, *Chapter* 370.

It is suggested by the appellant, that the Act of 1890, chapter 370, which authorizes the city of Baltimore to regulate the use of its streets, and to require telegraph, telephone and electric light wires to be placed under ground, conferred a general authority upon the Mayor and City Council to repeal, alter or amend any of the street railway ordinances.

Even the Court of Appeals of Maryland gave no weight to this claim, but on the contrary, seems to have decided that the Act in question made absolutely no change in the rights of the city of Baltimore in regard to the appellant, and did not add in any way to the powers of the city, except, perhaps, in the matter of underground conduits for wires, with relation to which the Act was passed.

Thus, Judge Bryan, delivering the opinion of the

Court of Appeals in the controverted case, says, that "it has been for a long time recognized as the law that the Mayor and City Council of Baltimore have full and complete control over the streets and highways of the city;" and Chief Justice Alvey, in his supplemental opinion, says, of the Act of 1890, that "it is but an amplification of their general power over, and right and duty to *regulate* and maintain the streets and other highways of the city, for the use of the public."

The Act of 1890, chapter 370, not only did not confer any new rights on the city, but gave it none which are not possessed by all municipal corporations under their implied powers.

To say, therefore, that the Act of 1890 gave the city the right to repeal all or any of its street ordinances is equivalent to saying that no municipal corporation can pass an irrepealable ordinance, with or without legislative authority.

D.

Act of 1892, *Chapter* 112.

The appellant does not suppose that it is seriously contended that the provision of the Act of 1892, which reserves to the Mayor and City Council the *same rights* of amendment, alteration and repeal, which they have over Ordinances passed under their general powers, gave to the Mayor and City Council any control over the Ordinance No. 23, which they did not have at the time of its passage. This is practically admitted throughout the litigation. Thus, in the opinion of Judge Bryan, no attention is called to the reservation at all, while in the opinion of Judge Alvey, it is referred to only for the purpose of saying that "it is quite clear that the Act of 1892, Chapter 112, has in no manner divested the Mayor and City Council of the power over the streets of the City upon which the tracks of the appellant may be

laid." And so in the answer of the defendant (fifth paragraph) it is only claimed that "by this reservation the power of the defendant over said ordinance is as full and complete as if the said Act had not been passed," all of which is admitted by the appellant. So that the question is simply reduced to this: What are the rights of amendment, alteration or repeal, which the Mayor and City Council possess over an ordinance passed under their general powers? And the answer made by the authorities is: If the ordinance in question does not constitute in itself a contract, but relates to the internal affairs of the city, the rights of amendment, alteration and repeal are without limitation, while if the ordinance in question does constitute a contract, the rights of amendment, alteration and repeal are only those which are expressly reserved. If the Legislature had intended to reserve new and *additional* or *absolute* powers of amendment to the municipal corporation, it would not have reserved only the "*same*" powers. It takes pains to *limit* the municipal corporation to the "*same*" powers, to wit, the powers *reserved* in the Ordinance.

The Act of 1892, chapter 112, only dealt with the elevated portion of the company's railway, as will fully appear from the recital.

Moreover, it had been expressly decided by the Court of Appeals (Koch vs. North Ave. Co., 75 Md. 222, 232) that the Ordinance was valid except as to the elevated portion of the tracks.

It will be conceded that it is a principle of law that a right of amendment will be strictly construed, and will not be eked out by construction or implication.

The sole purpose of the reservation in the Act of 1892 was to preserve to the city its reserved rights under Ordinance No. 23; it being the opinion of the then City Solicitor that the legislative ratification of the elevated structure might afterwards be appealed to by

the company to prevent the city from forcing the company to remove the structure hereafter, if the surface steam railway tracks are removed from North street. (See Ordinance No. 23, section 8.)

The learned Circuit Judge, in discussing this question as to whether the Act of 1892, chapter 112, gave the city any additional powers, says: "It seems to me that it does not, so plainly that it is rather strange it should be seriously contended to the contrary."

E.

Police Power.

It seems to be conceded by the appellant, that if the Court shall find that Ordinance No. 23 constituted a contract between the appellant and the North Avenue Company, it is not relevant to inquire into the questions which have been made as to whether public convenience will be subserved by a single rather than a double track on Lexington street.

Thus, in his letter of advice to Mayor Latrobe, upon which this assault upon the Lake Roland Company was founded, the then City Solicitor says:

"If the Ordinance of April, 1891, constituted a contract between the City and the railroad company, and the City Council of 1891 had the power to make such a contract, it must be conceded that it is not possible for the present or any succeeding City Council to repeal or modify it, without the consent of the company."

The power of the city to make the contract is, under the authorities, from the Darmouth College case down, found by inquiring *whether it had legislative authority to pass the Ordinance.* Again, on page 6 of the City Solicitor's brief, filed in the Court of Appeals, he says

"Of course if there was a valid contract between the appellant and the City of Baltimore, it is beyond the power of the City authorities to in any way impair its obligation, *no matter how injurious to the public may be the exercise of the privilege supposed to be conferred by it.* It is necessary, therefore, to determine if the Ordinance of April 8, 1891, was a contract."

The limitations of police power, in a case of this character, are given by Judge Cooley ,as follows:

"The limit to the exercise of the police power in these cases [where charter rights are involved,] must be this: The regulations must have reference in the comfort, safety and welfare of society; they must not be in conflict with any of the provisions of the charter, and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact and not amendments of the charter in curtailment of the corporate franchise."

Cooley Const. Lim., (6th. Ed.,) page 710.
Booth on Street Railways, Sec. 220.

Even if it be assumed that the effect of Ordinance No. 1 was only to limit the Lake Roland Company to the use of a single track on Lexington street, in lieu of the double tracks authorized by the Ordinance, and laid by the company, it requires no argument to show that the repealing Ordinance has deprived the Lake Roland Company of an "essential right."

The Record shows that the appellant laid so much stress upon its terminus at the corner of Charles and Lexington streets, that unless it had been interfered with, it would have abandoned all idea of building its tracks down to Fayette street, and they are only being operated now because it is simply impossible for the appellant to operate its railway system to its Charles street terminus by a single track. (Record, page 136.) It can

neither maintain its schedule of cars on a single track, nor can it perform its duties to the public and to the persons who desire to enter its cars on Lexington street. As is shown also by the testimony, the corner of Charles and Lexington streets is the shopping centre of the city, and the "Mecca" of ladies engaged in midday shopping, upon whom the Court need not be told the company must depend for its midday travel. The testimony shows that "this Charles and Lexington street terminus is the most valuable part of their franchise." (McLane, Record, page 135.)

Ladies will not go to the corner of Lexington and North streets, and without railway facilities to Charles street, the company cannot compete with the North Baltimore Company, whose cars drain the same territory, and reach the corner of Charles and Lexington street. The testimony also shows that the syndicate of bondholders had this particular part of the franchise in their minds when they agreed to take the bonds. To pretend now that it is not an essential part of the company's rights, and an essential part of the bondholders' security, is to trifle with the facts.

Pending this appeal, the Lake Roland Company is operating a single track on Lexington street, between North and Charles streets, and the only use it can make of it is for the operation of a single car running back and forth from North street, to its principal terminus at Charles street. This requires all passengers bound for Charles street ("the bulk" of all the passengers carried by the north and south lines,) to change cars at North and Lexington streets, for a ride of three squares. It goes without saying that this is a great injury to the Lake Roland Company, and a source of daily loss. (See Frederick, Record, page 129.

The Court will see from the affidavits of property holders and residents on Lexington street, including the owners and occupants of all the large buildings, that the

persons most interested in Lexington street prefer the double tracks. So far as the use of the street for *through* travel is concerned, it will be conceded that double tracks, furnishing two channels for travel in opposite directions, are less of an obstruction to a street of the character of Lexington street, than a single track on which a street car travels in both directions, thus arresting the tide of travel both going and coming.

The proof shows that Charles street between German street and Saratoga street, presents the same questions in regard to double tracks, as does Lexington street. It is nearly a foot narrower than Lexington street. It is lined with large retail stores, and in addition, has large furniture warerooms, piano warerooms, sewing machine warerooms, &c., to which vehicles of the largest size must have constant access. The fashionable shops are frequented every day by ladies in their carriages. Not only has it never occurred to anyone to complain of the double tracks on Charles street, but pending this controversy, the Mayor and City Commissioner permitted the construction of new double tracks on Charles street, and the erection of poles and wires for the trolley system and the operation of electric cars.

The gauge of a street railway track in Baltimore is the widest known in this country, 5 feet 4½ inches. Vehicles built outside of Baltimore are always too narrow to fit the track. Vehicles made in Baltimore, with rare exceptions (such as a three horse furniture van, mentioned in the defendant's testimony), from the steam fire engine down to the ordinary coal cart, are made to fit the gauge of the track. From the outside rim of the wheels, therefore, of ninety-nine vehicles out of a hundred, the width is never greater than 5 feet 4½ inches. A hub will rarely, if ever, extend more than two inches beyond the line of the outside rim of the wheel. When a vehicle is standing at the curb, one hub will extend

over the sidewalk. Therefore, a space of five and one-half feet is the largest space occupied by ordinary vehicles. Buggies and private carriages occupy less space than that. The over-hang of the car is nine inches. So the Court will see that from Charles street to North street, after the double tracks are laid, there will be ample room on both sides for vehicles to stand at the curb without being interfered with by the passage of the cars.

It is, of course, contended by the appellee that this discussion has no relevance whatever to the case at bar. The facts are only referred to, because the appellee does not wish this Court to assume that it is enforcing its strict legal right against the wish of the public, and the comfort and convenience of property owners and residents on Lexington street.

When Ordinance No. 23 was passed, the exact physical question as to the use of Lexington street, was necessarily before the Mayor & City Council, and must necessarily have been considered by the Joint Standing Committee on City Passenger Railways, when it reported the Ordinance, by the members of the Council when they voted for it, and by the Mayor when he approved it. The width of the street was known, the gauge of the railway tracks was fixed and the method for operating the company's cars was defined.

At best it can only be argued that the municipal corporation, after granting the right to lay the double tracks, upon fixed conditions, has changed it mind. The question of law is, has the municipal corporation the legal right to make the change.

VI.

THE PUBLIC PRESS.

In view of the great stress laid upon the utterances of the Baltimore *Sun* by the appellant, it is necessary and

proper for the appellee to call the attention of the Court to the editorial utterances of the other four leading daily newspapers published in Baltimore.

Not only was the pretended championship of public interest on the part of the city government repudiated by property owners and residents on Lexington street, but four out of the five daily newspapers united in denouncing the position taken by the city.

Thus, the morning *Herald* said editorially, (Record, page 213):

"Has not the State of Maryland and City of Baltimore badgered and oppressed the Lake Roland Railway corporation about long enough?"

The *Baltimore News* said editorially, on April 15th, 1893, (Record, page 215):

"While the bosses are about it, why not have the Council pass an ordinance forfeiting the whole Lake Roland franchise, ordering all the tracks and poles torn up and expelling the officers, stockholders and directors from the State? Kick 'em out!' How dare these insolent carpet-baggers come in here and spend their millions building rapid transit on streets which the bosses wish is pre-empt by franchises for 'paper' roads! Let Lexington street be cleared immediately so that it may be turned over, as soon as public sentiment has subsided, to the franchise-braking concern which has already gobbled Douglas street, and to which the Council has voted the right for a ram-shorn railroad, ramifying all over East, North and West Baltimore!"

The same paper said editorially, on April 27th, 1893, (Record, page 215):

"This is sound and disinterested advice to Mayor Latrobe. After his opposition to the Lake Roland Elevated Railroad's attempts to put two tracks on Lexington street, where everybody directly interested wants them, he certainly cannot afford to

put trolley poles and wires on Baltimore street where they are distinctly and emphatically, not wanted."

The *Baltimore American* said editorially, (Record, page 211):

"It has been a matter of much regret to most of the citizens of Baltimore that the Lake Roland Railway has been almost constantly blocked in its plans by the city authorities. The difficulties of the company, which represents several millions of new investment in this State, have undoubtedly served to discourage other capital from coming here, and the policy of hampering it is unquestionably obnoxious to the people."

The *Baltimore World* said editorially. (Record, page 212):

"It is well that we have Courts to stand against injustice, for if ever there was injustice it is in this assault upon the Lake Roland Company. For it is an assault and nothing else. The *World* has always been outspoken for what it believed to be right. It has been so in this Lake Roland case and proposes to be. It wants the city protected in all possible ways, but the Mayor cannot bring forward one good and valid reason why this assault has been made upon the Lake Roland Company."

VII.

OPINION OF THE COURT OF APPEALS.

The appellee, with the greatest deference to the Court of Appeals of Maryland, contends that it is apparent on the face of the Record that the Court of Appeals based its opinion upon an incorrect assumption of facts, and through some inadvertence entirely overlooked the provision of the General Incorporation Law under which Ordinance No. 23 was passed.

The opinion of the Court, delivered by Judge Bryan, starts out with the assumption that Ordinance No. 23

was passed under the authority of the Act of 1890, chapter 370; or in other words, under a general power of the city, of which it decides the Act of 1890 was only declaratory, to regulate the use of its streets.

The Court then proceeds to argue from this assumption, that Ordinance No. 23 was not a contract because a municipal corporation could not make a contract for the use of its streets under any such general powers.

The Court of Appeals assumes, indeed it actually decides, that a municipal corporation could make a contract with a railroad company for the use of its streets, if the General Assembly had authorized it expressly to pass an Ordinance giving a railway company the right to use its streets.

It entirely overlooked the fact that the North Avenue Company was incorporated in 1889, (before the passage of the Act of 1890,) under the General Railway Act, and that by the 169th section of Article 23, of the Code of Public General Laws, (under which Article the General Railway Act is codified,) the Mayor and City Council of Baltimore was expressly authorized to pass Ordinance No. 23.

The Record also shows conclusively that the Court of Appeals of Maryland, was entirely misled in regard to the facts relating to the physical condition of Lexington street, and the circumstances connected with the construction of the double tracks on that street.

Thus the Court of Appeals says (Record page 185):

"By measurement it is shown that the distance between the overhanging sides of the cars and the gutter on the south side of Lexington street between Charles and Calvert, will vary from four feet seven inches to three feet eight inches, and on the north side it varies from four feet seven inches to three feet four inches, and between Calvert and North street on the south side the side of the car will project one inch over the outside

edge of the gutter, and on the north side it will vary from eight feet two inches to eight feet ten inches. Measurements were also made of different vehicles, ranging from the large furniture van to the small one horse carriage, and it was found that they measured from eight feet four inches for the largest to six feet one inch for the smallest."

It has already been shown in another part of this brief, that these measurements are not only incorrect but that they wholly fail to represent the true situation.

To say, that "the small one-horse carriage" measures "six feet one inch" in width is an absurdity on its face. The standard "three-quarter" buggy is less than four and a half feet between outside rim of tires and but a little over four and a half feet between outside rim of hubs. Five and a half feet between the outside rim of hubs is a generous allowance for the average of vehicles of all classes. (Affidavit of Simmons, Record, page 45.)

It is clearly unfair to dwell upon the width of vehicles such as a three horse van, because such a vehicle could not find room between the curb and the outside rail on half the streets in Baltimore where double tracks are laid.

It is equally unfair to dwell upon the fact that if the double tracks are laid on the square between North and Calvert streets, on the south side of the street, as insisted upon by the City Commissioner and the Mayor (Record, page 132); because the Lake Roland Company was entirely willing to put the tracks in the middle of the street, which method of construction, as shown by the testimony, would have left on both sides of the track, between the curb and the nearest rail, a clear space of 7.17 feet, which is not only ample for standing large vehicles (including steam fire engines,) but equals the space usually left and exceeds the space left, for illustration, on the main north and south thoroughfares in Baltimore, viz. Charles street.

The measurements misled the Court for another reason.

The measurements quoted by the Court, are from the outside rail to the gutter stone, which assumes the continuance of the old fashioned gutter construction then on Lexington street, with two sloping sides from the gutter and street, respectively, to a large flat gutter stone. This method of construction has been abandoned upon all the principal streets in Baltimore, including Baltimore street, Charles street, Calvert street, Fayette street, &c., and since the filing of this suit has been abandoned on Lexington street, between North and Calvert. Under the modern and proper construction of the gutter the gutter stone is laid directly against the curb stone, so that the wheel of a vehicle is driven immediately alongside of the curb. The measurement to the gutter stone is, therefore, wholly unfair, and is more than a foot out of the way.

Surely the city is not entitled to break faith with the Lake Roland Company because it happens that an old-fashioned method of gutter construction still prevails on two out of the three squares of Lexington street in controversy, when by constructing a proper gutter on the two squares in question, such as is constructed on Charles street, and on one square of Lexington street, it can remove every objection, real or imaginary, upon which it has based its attack.

It may also be suggested that inasmuch as the city has full control over the wide *sidewalks* on Lexington street, it would be its legal and moral duty to gain additional street room (if it were needed) by widening the street by taking a few inches off the sidewalks, rather than to turn its back upon its solemn pledges, upon the faith of which so much money had been expended.

Again the Court of Appeals says (Record, page 187):

"But the tracks were laid on Lexington street after the Mayor's objection to double tracks was made known to the President of the Railroad Company * * * On the 7th of November the Mayor and City Solicitor each wrote a letter to the President, informing him that at the first meeting of the City Council an Ordinance would be submitted to prohibit the laying of the double tracks. After the receipt of these letters by the President the work of laying the double tracks was continued night and day without intermission until it was completed. The General Manager of the railroad testified that he did not know that there had ever been any construction work done in the city at night except what was done on Lexington street. Lexington street had not been reached in the regular course of the construction of the road."

All of the statements contained in the above paragraph are in the teeth of the undisputed facts as shown by the Record.

The letters of the Mayor and City Solicitor, to which the Court of Appeals refer, will be found on pages 70 and 71 of the Record. Both of these letters refer in terms to the square between North and Calvert streets. It is absolutely beyond all dispute that the double tracks were laid on Lexington street, between Calvert and Charles streets (two out of the three squares) without any criticism or objection whatever, and without any hint or suggestion from the public authorities that they objected to two tracks on any part of Lexington street, except for the short square between North and Calvert streets.

It is equally a mistake on the part of the Court of Appeals to suggest that work was begun on Lexington street for the purpose of anticipating the action of the City Council. It is the undisputed testimony (Record, page 104) that the company began laying its tracks on Lexington street at the request of the contractor who was about to lay asphalt pavement on Lexington

street, between North and Calvert streets. The contractor was about to begin his work, and wished the company's tracks laid before the asphalt was put down.

It is equally a mistake for the Court of Appeals to allege that the General Manager testified that no work was done by the company at night, except that on Lexington street. The General Manager testified (Record, page 114) in answer to the 54th cross question:

"I misunderstood you in regard to the work on North street. We have been working night and day in putting on our foundations there, for the purpose of not inconveniencing travel. Since the very start, where travel would be a good deal interrupted by working in the day time, we have worked at night.'

Again the Court of Appeals says:

"There is no street between Lexington and the water on the south which is not obstructed in some part of it by railroad tracks; and none nearer than Eager, on the north, (nine blocks distant,) which can be used as a thoroughfare to the eastern part of the city."

The latter part of this statement is not only absolutely without foundation in fact, but there is no excuse for it whatever, because a moment's thought would have suggested the fact, which is open to common observation and requires no testimony to support it, that between Lexington and Eager streets there are at least two handsome thoroughfares extending across the city, (Madison and Monument streets,) while Lexington street never has been and never will be a thoroughfare, because it is crooked and hilly. Fayette street has been widened since this controversy began, and by reason of its grade and good pavement, it is naturally selected by vehicles coming from east Baltimore to the City Hall, in order to avoid the Lexington street hill.

In this connection it is proper to call the Court's attention to the following recital in the repealing Ordinance:

"Whereas the President and other officers of the said North Avenue Railway Company knew, before any expense was incurred by the said Company, or before any portion of the work of laying said tracks on said portion of Lexington street had been done, that in the judgment of the Mayor and City Commissioner, the laying of a double set of iron railway tracks on said portion of Lexington street would be detrimental to the public interest; and that the City's Solicitor had given the opinion that the Mayor and City Council had full power to alter or revoke the authority given by said Section 1 of Ordinance 23, of April 8, 1891, to lay double iron railway tracks on said portion of Lexington street; and that the Mayor would on the earliest practicable occasion recomend the passage of an Ordinance altering and revoking the authority to lay such double iron railway tracks on said portion of Lexington street."

The absolute incorrectness of this recital, upon the undisputed testimony in the Record, will furnish to this Court an illustration of the reckless and disingenuous treatment of the railroad company by the public authorities. Such a recital, if true, could be relied upon to excite the prejudice of the City Council, which rushed the repealing Ordinance through both Branches in a single night, without reference to the Street Railway Committee, and without giving the railroad company any hearing. It was accepted as true by the Court of Appeals. It will certainly be conceded that the statement had no foundation in fact whatever.

The undisputed fact is, that all of the double tracks on Lexington street were laid with the full approval, consent and co-operation of the public authorities, with the exception of about three hundred and twenty feet between North street and the east side of Calvert street.

The first definite notice which the Lake Roland Company obtained even in regard to the tracks between North and Calvert streets, was contained in the letter from

Mayor Latrobe on November 7th, after the double tracks were in position on Lexington street between North and Calvert streets.

It will hardly be seriously contended that the Lake Roland Company was called upon to stop its work by reason of the statement made by Mayor Latrobe in the Baltimore *Sun* of November 4th, 1892. (Record, page 171.) It might as well be contended that the company was called upon to stop its work on its elevated structure, because the Mayor said in that interview that "the elevated road on North street practically ruins for a business thoroughfare, the street that is really the natural north and south thoroughfare in central Baltimore."

VIII.

OPINION OF JUDGE MORRIS.

It only remains to consider briefly the dissenting opinion of the learned District Judge.

The position taken by the dissenting opinion of Judge Morris, can be best understood by the following quotation from him:

"It may be conceded, that under the general railroad law, the city had the power to 'agree' with the railroad company as to the use of the streets, and under that power to make the agreements embodied in Ordinance 23, but, in my judgment, that agreement was necessarily made subject to the rule that, except by express authority from the Legislature, the city, being but a trustee of the public highways for the benefit of the public, could pass no irrevocable ordinance depriving itself of its power to regulate the use of the streets, so as to prevent danger to the public. As soon as it becomes apparent that a privilege of using the streets has been granted by it, which works danger to the public, it becomes the duty of the city to so regulate or modify the privilege as to protect the public, especially if this can be done without destroying the essential substance of the privilege."

This Court will at once see that Judge Morris did not fall into the error of the Court of Appeals of Maryland, of supposing that Ordinance No. 23 was passed only under the general powers of the city or under the Act of 1890, Ch. 370, but properly founded the Ordinance on the General Railroad Law, which empowers the city to authorize a city passenger railway, incorporated under that law, to lay tracks on the city streets.

Judge Morris has, therefore, announced the doctrine that there is a distinction between the legal effect of an Ordinance passed by the city under a general enabling Act, such as the General Railroad Law, and a special Act authorizing a particular corporation to apply to the municipal corporation for street franchises. His opinion either is based on this conclusion, or else he means to say that an Ordinance cannot have the effect of an irrepealable contract, unless the municipal corporation has, in express terms, been authorized to pass an Ordinance of an irrepealable character.

It is respectfully contended by the appellee, that whichever meaning be given to the language of the Dissenting Judge, his conclusion has absolutely no support, either in reason or authority.

There is clearly no distinction between the legal effect of an Ordinance passed under a general enabling Act and an Ordinance passed under a special enabling Act; or again, between an Ordinance passed in either way and one passed under the general or implied powers of the municipal corporation. In any case, the sole question is as to whether the municipal corporation had the power to pass the Ordinance. In no case can the source of the power be a question; the only question being: Does the power exist? Was the Ordinance passed in conformity with the power as delegated?

This Court would not certainly permit it to be argued that there was a difference between the legal effect of an Act of Congress passed under *express*, and a similar Act passed under *implied* constitutional powers.

All of the city's powers come from the Legislature. If it be conceded that a right to permit a street railway corporation to use its streets is implied from its street control, that can only mean that the Legislature has granted the city the right to pass an ordinance authorizing such a corporation to use its streets. If it confers the right in express terms, it does no more and no less than it does in granting general powers from which the right can be implied. Moreover, as was pertinently remarked by Judge Lurton in Detroit Ry. vs. Detroit, 22 U. S. App. 570, 600, (Mr. Justice Jackson concurring): "The power to make an irrevocable contract, giving an easement of some considerable duration, is an inseparable incident in any scheme for furnishing such public facilities as a street railroad."

Judge Morris does, however, follow the Court of Appeals in confusing grants of *exclusive* rights with ordinary grants. The cases cited by the appellee, which could be multiplied almost indefinitely, show that this Court, as well as the Courts of Appeal of the States, have long recognized the right of a municipal corporation to make an irrepealable contract, by way of an Ordinance, for the use of its streets, and hold conclusively that such a contract may be made with a street railway company, either under the implied powers of the city, a General Railway Act, or a special enabling Act.

Judge Morris also relies upon the cases of Rittenhouse vs. Mayor, (*supra*) and State vs. Graves, (*supra*) which are relied upon by the Court of Appeals. As has already been shown in this brief, and as is clearly set forth in the opinion of the learned Circuit Judge, these

cases belong to a class of cases which announce a well established doctrine relating only to Ordinances regulating the internal affairs of a city government.

JOHN N. STEELE,

JOHN E. SEMMES,

FRANCIS K. CAREY,

E. J. D. CROSS,

Solicitors for Appellee.